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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1981

No. 81 6338

KEITH FAIR,

Petitioner,

vs

WALTER D. ZANT, Warden,
Georgia Diagnostic and
Classification Center,

Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE SUPERIOR COURT OF
BUTTS COUNTY, GEORGIA

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KEITH FAIR,

Petitioner,

vs

WALTER B. ZANT, Warden,
Georgia Diagnostic and
Classification Center,

Respondent

PETITION FOR WRIT OF CERTORARI
TO THE SUPERIOR COURT OF
BUTTS COUNTY, GEORGIA

Petitioner prays that a writ of certiorari issue to review the judgment of the Superior Court of Butts County, Georgia, entered on October 20, 1981. Application for certificate of probable cause to appeal was denied by the Supreme Court of Georgia on January 6, 1982.

CITATIONS TO OPINIONS BELOW

The opinion of the Supreme Court of Georgia is reported in Fair v State, 245 Ga. 868 (268 S.E.2d 316)(1980), cert den. 449 U.S. 986 (1981). The unreported opinion of the habeas corpus court is attached hereto as Appendex I.

JURISDICTION

Jurisdiction of this Court is involved under 28 U.S.C. § 1257 (3), Petitioner having asserted below and asserts in this Court deprivation of rights secured by the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Fifth, Eighth and Fourteenth Amendments to the Constitution of the United States.

2. This case also involves the following provisions of the Code of Georgia:

§27-1404 Form of arraignment; plea of "guilty; withdrawal of plea

> Upon the arraignment of a prisoner, the indictment shall be read to him, and he shall be required to answer whether he is gulity of the offense charged in the indictment, which answer or plea shall be made orally by the prisoner or his counsel. If he shall plead "guilty," such plea shall be immediately recorded on the minutes of the court by the clerk, together with the arraignemnt; and the court shall pronounce upon such prisoner the judgment of the law, in the same manner as if he had been convicted of the offense by the verdict of a jury; but, at any time before judgment is pronounced, the prisoner may withdraw the plea of "guilty," and plead "not guilty," and such former plea shall not be given in evidence against him on his trial.

§27-2534.1 Mitigating and aggravating circumstances; death penalty

> (a) The death penalty may be imposed for the offenses of aircraft hijacking or treason, in any case.
> (b) In all cases of other offenses for which the death penalty may be authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating circumstances which may be supported by the evidence:

(1) The offense of murder, rape, armed robbery, or kidnapping was committed by a person with a prior record of conviction for a capital felony, or the offense of murder was committed by a person who has a substantial history of serious assaultive criminal convictions.

(2) The offense of murder, rape, armed robbery, or kidnapping was committed while the offender was engaged in the commission of another capital felony, or aggravated battery, or the offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree.

****

(7) The offense of murder was committed against any peace officer, corrections employee or fireman while engaged in the performance of his official duties.

****

QUESTIONS PRESENTED

-1-

Whether Petitioner's guilty plea to capital murder violated the Fifth and Fourteenth Amendments to the United States Constitution in that his plea was involuntarily made without a full understanding of the consequences of the plea?

-2-

Whether the Georgia Supreme Court's opinion below denied Petitioner due process of law and right to trial by jury, by its new and novel application of Georgia law in denying Petitioner his statutory right to withdraw his plea of guilty and proceding to trial?

-3-

Whether Petitioner was denied due process of law by the imposition of a sentence of death based on a felony for which Petitioner was later acquitted?

-4-

Whether Petitioner was denied due process of law by the imposition of a sentence of death where there is no factual basis to sustain same under Godfrey v Georgia, 446 U.S. 420 (1980)?

-5-

Whether introduction at Petitioner's capital sentencing trial of testimony given pursuant to undisclosed promises of leniency denied Petitioner due process of law?

HOW THE ISSUES WERE RAISED BELOW

-1-

Questions 1,2,4, and 5 were first raised in Petitioner's Petition for Writ of Habeas Corpus which was heard and rejected by the Superior Court of Butts County, Georgia. The Georgia Supreme Court then denied Petitioner's Application for Probable Cause to Appeal those issues.

-2-

Petitioner's challenge to his sentence of death based upon a felony for which he was later acquitted was first raised on direct appeal to the Supreme Court of Georgia. That Court rejected Petitioner's claim in Fair v State, 245 Ga. 868, (268 S.E.2d 361)(1980). The issue was then raised in Petitioner's Petition for Writ of Habeas Corpus which was heard and rejected by the Supreme Court of Georgia then denied Petitioner's Application for Probable Cause to Appeal the issue.

STATEMENT OF THE CASE

The Petitioner, KEITH FAIR, was indicted in the Superior Court of Hall County, Georgia, for the murder of one JACKIE MORRIS. After pretrial motions and other matters were concluded by the trial court, the petitioner plead guilty to the murder and submitted the issue of punishment to the trial judge without a jury (T-3-21). The trial judge accepted the plea (T-19) and conducted a full scale sentencing trial on the issue of punishmnet.

The State contended that the petitioner and his accomplices, including Jackie Morris, had killed an individual in Habersham County in a dispute over a money matter. Later that night, Jackie Morris was killed in Hall County, Georgia. The State charged the petitioner during the sentencing trial with violations of § (b)(2) and § (b)(7); the theory being that the murder of Morris was committed while the petitioner was engaged in the commission of the murder of the Habersham County victim.

After the sentence hearing and a nights deliberation, the trial judge orally announced that the death penalty would be imposed and petitioner immediately withdrew his plea of guilty orally and by written withdrawal. (T-484, 487, R-9-22). Both the oral and written withdrawals were accomplished prior the the sentence being received by the clerk and entered upon the docket (T-490); and there is no issue of fact regarding the timing of petitioner's withdrawal. See Fair v Stste, 245 Ga. 868, 875(7). However, the trial court refused petitioner's withdrawal (T-491) and entered the sentence of death.

The Georgia Supreme Court (Fair v State, 245 Ga. 868) affirmed the death sentence based on § (b)(2) and § (b)(7). The temporal and spatial separation of the two capital felonies did not prevent the Court from concluding that both murders were "part of a continuous transaction and. . . were mutually dependent crimes." Id. at 870

Further, petitioner was subsequently acquitted of the first murder in a separate trial (see record), but the Georgia Supreme Court found this to be no obstacle to affirming the findings of § (b)(2). In other words, the sentence of death was upheld for murder number two (Morris) based on the aggravating circumstances that he had also committed murder number one; yet, in a separate trial, petitioner was found not guilty of murder number one. The Court observed that two different triers of fact were involved and "different triers of fact may reach different results". Id.at 871, 881.

Further, the Court ruled that the § (b)(7) findings of "depravity of mind" was justified because the victim was abused after death based on a decision made after this opinion. Id. at 881, Hance v State, 245 Ga. 856.

On June 24, 1980, after this Court's decision in Godfrey v Georgia, 446 U.S. 420 (1980), without any notice to counsel that it was reexamining the case, the Georgia Supreme Court issued an addendum to its initial affirmance announcing that the validity of the death sentence was not affected by Godfrey*

*This conduct is itself startling to this writer. Indeed, six other Georgia death cases were vacated and remanded for reconsideration in light of Godfrey. The Georgia Supreme Court reinstated all six death sentences and refused to allow counsel for any of the defendants to argue or brief the Godfrey issues. See, e.g. Baker v State, No. 34588(July 15, 1980). Surely, the right to notice and an opportunity to be heard is the very essence of justice, and is a fundamental condition "universally prescribed in all sustems of law established by civilized countries." Twining v New Jersey, 211 U.S. 78, 111(1908).

Petitioner next filed a petition for writ of certiorari to this Court which was denied.

A petition for Writ of Habeas Corpus was then filed in the Superior Court of Butts County, Georgia, on June 4, 1981. The habeas court entered an order denying the petition as to all relief requested, a copy of that order being Appendix I attached hereto. On January 6, 1982, the Georgia Supreme Court denied petitioner's application for a certificate of probable cause to appeal the habeas order.

REASONS FOR GRANTING THE WRIT

I. PETITIONER'S GUILTY PLEA VIOLATED THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION IN THAT HIS PLEA WAS INVOLUNTARILY MADE WITHOUT A FULL UNDERSTANDING OF THE CONSEQUENCES OF THE PLEA

The habeas court improperly found that Petitioner's plea of guilty to capital murder was voluntarily, knowingly, and intelligently made under the Fifth and Fourteenth Amendments to the United States Constitution.

The habeas court made the following findings of fact, inter alia:

> ". . .based on their extensive legal research, they [trial counsel] concluded under Ga. Code Ann. 27-1404, that Petitioner had the absolute right to withdraw his guilty plea after sentence was pronounced but before it was filed with the clerk (H.T. 23,69). They prepared a contingency plan for withdrawing Petitioner's plea (H.T. 12-15, 66-69). . . .When the trial judge imposed a death sentence, Counsel attempted to withdraw Petitioner's plea, but the trial judge refused to allow withdrawal (H.T. 12-15, 66-69).
>
> **********
>
> "Prior to accepting Petitioner's plea of guilty, the trial court exhaustively examined the appellant to determine if the plea was voluntarily and intelligently given;" informed Petitioner and his counsel that the Court was not conscientiously imposed (sic) to capital

> punishment and would impose a death sentence if the facts warranted it; recessed to allow Petitioner to confer again with his counsel; and thereafter accepted Petitioner's plea of guilty."

In addition, trial counsel testified that he advised Petitioner that he had an "absolute right" to withdraw his plea of guilty (H.T. 10-11); and that this formed Petitioner's basis for the plea itself (H.T. 12). Further, that Petitioner indicated that he desired a jury trial (H.T. 23); and that "in any event . . .we could always get a jury trial" (H.T. 25, 67, 70).

Petitioner testified unequivocally that the "only reason I pled guilty" was with the understanding that the plea could be withdrawn, as a matter of right, and "they had to . . . let me have a jury trial" (H.T. 55).

Finally, the trial court, in pre-trial proceedings, specifically reminded counsel and Petitioner that he could change his plea and go to trial. (T.T. 532; H.T. 29).

The decision whether to plead guilty or to contest a criminal charge is probably the most important single decision in any criminal case, especially so in a death case.

When a man facing the electric chair retains or is appointed counsel, a portion of his life (if not his life itself) is delegated to one who has both the legal and moral duty to defend his interests. The notion of the attorney as "agent" goes back to the Greek practice of employing a speech writer when a litigant had to address the Athenain assembly to obtain a legal judgment. This role of the lawyer remained essentially undeveloped through eras when the law itself was less complex. Indeed, some of the colonies prohibited legal representation for money, convinced

that lawyers made complex that which was simple, and poisoned the well of justice through greed, delay and obstruction. However, as the legal and social order grew in complexity, the notion of the lawyer as an agent conducting litigation in behalf of his client also grew. This development in the concept of "representation" has become the vehicle for mystifying the complexities of the law and rendering it virtually incomprehensible to the average criminal defendant.

Thus, as the very complexity of law forces a man to speak through an agent, the advice of the agent, his competence, and his ability to waive the rights of his principal becomes highly relevant.

As early as 1927, this Court in Kercheval v United States, 274 US 220(1927) recognized that a guilty plea should not be accepted unless voluntarily and knowingly made. A number of later cases have reiterated this principal. E.g. Boykin v Alamaba, 395 US 238(1969); Brady v United States, 397 US 742 (1970); McCarthy v United States, 394 US 459.

The standard by which guilty pleas must be gauged was announced by this Court in Johnson v Zerbst, 304 US 458(1938): that a waiver of any federal constitutional right, to be effective, must be an "intentional relinquishment or abandonment of a known right." Id. at 464.

Subsequest cases have muddied the guilty plea waters. In the guilty plea trilogy (McMann, Parker and Brady)* this

*McMann v Richardson, 397 US 759(1970); Parker v North Carolina, 397 US 790(1970); Brady v United States, 397 US 742(1970).

Court apparently concluded that a competently counseled guilty plea could be presumed knowing and voluntary. See also Tollett v Henderson, 411 US 258(1973).

In McMann v Richardson, supra, the court held that a defendant, when pleading guilty, assumes the risk of ordinary error in either his or his attorney's assessment of the law and facts and is bound by his plea unless he can show serious derelictions on the part of his counsel sufficient to show the plea was not voluntary, knowing, and intelligent.

However, McMann also holds that, since a guilty plea is also a waiver of trial, unless applicable law otherwise provides, the plea must be made with sufficient awareness of its consequences. McMann v Richardson, 397 US at 766.

That this distinction is critical sub judice is reinforced by the decision in Lefkowitz v Newsome, 420 US 283(1975). There, the Supreme Court majority, in an opinion by Mr. Justice Stewart, concluded that the significance of a guilty plea is determined by the law of the jurisdiction that conducts the proceedings in which the plea is entered. The Court observed that ordinarily a guilty plea represents a "break in the chain of events which has preceded it in the criminal process." Id at 239. But because New York had legislatively "chosen not to treat a guilty plea as such a 'break in the chain of events' with regard to certain constitutional claims", a defendant who had pleaded guilty in New York would not be barred from asserting those claims in the future.

By Code Ann. §24-1404, Georgia has provided just such a 'break in the chain of events' in the guilty plea context. The Constitutional claim sought to be protected: the right to a trial by jury.

That this is the proper historical context is reflected in the early cases interpreting this Code Section. Illustrative of these cases is Woodward v State, 13 Ga. App. 130. In discussing what was then Penal Code (1910) §971*, the court held that "the right which the statute gives to the prisoner to withdraw his plea of guilty before judgment is pronounced is without qualification". Id. at 131. Further, the court clearly and unequivocally stated the purpose of this statute:

> "It is not the purpose of the law to invite pleas of guilty by persons charged with crime, but rather is it (sic) the purpose of the law to guarantee to all persons charged with a crime a trial by jury.
>
> Id. at 131 (emphasis added)

This clearly shows the interrelationship of the instant case with the Johnson - McMann - Lefkowitz requirements. First, petitioner's plea could not have been a relinquishment of a known right to a jury trial pursuant to the Johnson v Zerbst, supra. Petitioner's action cannot be construed as an intelligent waiver of his right to use the established proceedure to secure a trial by jury. Second, this "known right" is precisely the type of "break in the chain of events" envisioned by McMann and Lefkowtz. Third, the right protected is an important constitutional guarantee: trial by jury. Fourth, the nature of the sanction is extreme.

*Penal Code (1910), §971 declares, in pertinent part, that "at any time before judgment is pronounced, the prisoner may withdraw the plea of 'guilty', and plead 'not guilty.'"

Prior to the Georgia Supreme Court's decision in Fair, Ga. Code Ann. §24-1404, (and its consistent judicial interpretation) promised any accused pleading guilty security from the imposition of sentence without the verdict of a jury. Can not the statutes and decisions be accurately characterized as a legislative and judicial promise of a jury trial to any criminal accused who timely withdraws his plea of guilty? Is there any reason why Fair's guilty plea, based on the inducement of the statute and decisions, should not be considered any less a product of coercion because it was induced by a legislative and judicial inducement than by prosecutorial or judicial offers of sentencing concessions?

It is not suggested that an unattainable perfect knowledge is necessary before a defendant can enter a valid guilty plea. The task of the courts is to draw a line somewhere between perfect knowledge and absolute ignorance; and to specify the extent to which an accused is entitled to "know the score" before waiving his right to trial. Simply stated, Petitioner's plea in this case-given the unique nature of guilty pleas in Georgia - was not knowingly made and he was denied his right to a trial by jury; therefore, his conviction and sentence must be reversed.

II. THE APPLICATION TO PETITIONER'S CASE OF THE NOVEL CONSTRUCTION OF CODE ANN. §27-1404 DENIES PETITIONER DUE PROCESS OF LAW AS GUARANTEED BY THE 5th AND 14th AMENDMENTS TO THE UNITED STATES CONSTITUTION.

As outlined above, present Code §27-1404 has been consistently interpreted as guaranteeing a criminal defendant the right to withdraw his plea prior to pronouncement of sentence.

See, e.g. Woodward v State, supra; Clark v State, (1945) 72 Ga. App. 603; Wright v State, (1947) 75 Ga. App. 764; Farmer v State, (1974) 128 Ga. App. 461; Ware v State, (1974) 123 Ga. App. 406; Burkett v State, (1974) 131 Ga. App. 177; Williams v State, (1979) 148 Ga. App. 521.

In Fair, supra, the Georgia Supreme Court saw this "question of first impression" as "whether or to what extent Code Ann. 827-1404 applies to Ga.L. 1973, p. 159 et.seq." Id. at 876. The Court concluded that "a guilty plea, voluntarily and knowingly entered in a capital felony case. . .wherein the state seeks the death penalty. . .may not be withdrawn as a matter of right." 245 Ga. at 878.

Thus, the procedural setting is clear: A clear unequivocal statutory right, and a case of first impression expressly and by implication changing approximately one hundred years of precedent.

In Bouie v City of Columbia, 378 US 347(1964) this Court held:

> "When a State Court overrules a consistent line of procedural decisions with the retroactive effect of denying a litigant a hearing in a pending case, it thereby deprives him of due process of law, in its primary sense of an opportunity to be heard and to defend (his) substansive rights." Bunkerhoff-Fans Trust and Savings Co. v Hill, 281 US 673.

Further, it is well settled that state courts may not juggle their laws in an unpredictable and inconsistent fashion to the prejudice of federal constitutional rights. See, e.g. Staub v Baxley, 355 US 313, 320 (1953); NAACP ex rel. Patterson v Alabama, 357 US 449, 454-458 (1948); NAACP v Alabama, ex rel. Flowers, 377 US 288, 293-301 (1964); Wright v Georgia, 373 US 284, 289-291 (1963).

In Paul v Davis, 424 US 693 (1976) this Court aptly summarized its position as follows:

> "It is apparent from our decisions that there exists a variety of interests which are difficult in definition but are nevertheless comprehended within the meaning of either 'liberty' or 'property', as meant by the Due Process Clause. These interests attain constitutional status by virtue of the fact that they have been initially recognized and protected by state law, and we have repeatedly ruled that the proceedural guarantees of the Fourteenth Amendment apply whenever the state seeks to remove or significantly alter that protected status. . . In each of these cases, as a result of the state action complained of, a right or status previously recognized by the state law was distinctly altered or extinguished. It was this alteration officially removing the interest from the recognition and protection previously afforded by the state, which we found sufficient to invoke the procedural guarantees contained in the Due Process Clause of the Fourteenth Amendment."

In the instant case, what Petitioner complains of is the unforseeable judicial curtailment of his statutory rights by the Georgia Supreme Court by its affirmance of Petitioner's conviction and resultant death sentence. While the decision in Fair is unique in many respects, perhaps its most startling conclusion is that a defendant in a capital felony cannot withdraw his guilty plea. This Court has heard many times of the "qualitative difference" between capital cases and criminal cases in general, and the "corresponding difference in the need for reliability" in captial punishment. Woodson v North Carolina, 428 US at 305 (1976). Yet, in Fair the Georgia Supreme Court now implicitly holds that a misdemeanor defendant has more rights than a capital defendant!

The proposition that procedures sufficient to warrant less severe penalties may violate the Eighth Amendment when used to obtain a death sentence has received judicial recognition in a long line of cases. See Lockett v Ohio, 438 US 586 (1978); Roberts v Louisiana, 431 US 633 (1977); Gardner v Florida, 430 US 349 (1977); Woodson v North Carolina, supra. The situation is now reversed in Georgia: death defendants have one less right than do defendants in all other cases.

In what position, then, is the accused whose counsel fails to anticipate a subsequent change in the law as proclaimed by the highest court of his state? The decision of counsel and accused persons are reduced to a mockery if constitutional right of a capital defendant depend on the foresight of counsel in anticipating a new legal development. This Court has long recognized that "statutory or even judge-made rules of law are hard facts on which people must rely in making decisions and in shaping their conduct." Lemon v Kurtzman, 411 US 192, 199 (1973). The law "as it was relied upon is '. . .an operative fact and may have consequences which cannot justly be ignored.' The past cannot be erased by a new judicial declaration." Chicor County Drainage District v Baxter State Bank, 308 US 371, 374 (1940). These principles have allegedly been adopted by the Georgia Supreme Court. See, e.g. Allan v Allan, 236 Ga. 199 (1976); Strickland v Newton County, 244 Ga. 54 (1979); Walker v Walker, 247 Ga. 502, 503 (1981). Petitioner submits

that the decision of the Georgia Supreme Court in the instant action had the effect of retroactively denying him his constitutional right to a trial by jury, thus depriving him of due process of law. Bouie v City of Columbia, supra. Accordingly, Petitioner's conviction and the resultant death sentence must be reversed.

THE DEATH SENTENCE*

III. (A) THE DEATH PENALTY BASED ON CODE ANN. § 27-2534.1(b)(2) VIOLATED PETITIONER'S RIGHTS TO DUE PROCESS OF LAW.

In Fair, the Georgia Supreme Court upheld Petitioner's sentence of death because the murder in Hall County "occured during the commission of another capital felony." Code Ann. §27-2534.1(b)(2). 245 Ga. at 870

That § (b)(2) is constitutional on its face was settled by Gregg v Georgia, 428 US 153 (1976) ("On their face these procedures seem to satisfy the concerns of Furman.") That a section may be unconstitutional in its application was most recently seen in Godfrey v Georgia, 446 US 420 (1980).

Code Ann. §27-2534.1(b)(2) provides in pertinent part as follows:

> "The offense of murder, rape, armed robbery, or kidnapping was committed while the offender was engaged in the commission of another capital felony. . ."

It is submitted that the construction given by the Georgia Supreme Court to the Section (b)(2) aggravating circumstance in affirming Petitoner's sentence of death was unconstitutionally broad and violated the Fifth, Sixth , and Fourteenth Amendments to the United States Constitution.

*Included here are reasons III and IV.

In his concurrence in Gregg, Justice White stated that the purpose behind §(b)(2) is to allow the state to seek the death penalty in "witness-elimination" murders. 428 US at 221, n.10. Of course, every murder is a witness elimination murder in the sense that at lease one witness - the victim - is elminiated. However, it is clear that §(b)(2) cannot, consistent with the Constitution, apply to all murders. Gregg, supra, at 200.*

Two factors become apparent in an analysis of the statutory language. First, the statute is circumscribed by its own manifest temporal restriction, i.e. the "while engaged in the commission" clause. In the instant action, it certainly requires an over broad construction of §(b)(2) to justify the imposition of the death penalty, especially in light of the significant temporal and spatial separation of the two crimes. To allow such an overbroad construction to stand would, in effect, provide the sentencer with a vehicle to circumvent the objective and limited standards clearly set out in the statute defining when and under what circumstances the death penalty may be imposed. Gregg v Georgia, supra; Godfrey v Georgia, supra. Further, the clause "...while engaged in the commission" may be distinguished from the cluase "as a result of an act."** "While engaged

*The import of Justice White's remark in Gregg is that a necessary condition for a fulfillment of the conditions of §(b)(2) is that the defendant has killed someone to avoid being identified as the perpetrator of another crime.

**Even assuming the murder of Morris was "a result" of the death of Turner (Habersham County) it is insufficient to prove that it was done "in the commission" of killing Turner.

in the commission..." language connotes those elements of the act or transaction itself. The Georgia Supreme Court spoke to this issue in Groves v State, 116 Ga. 516 (1902), "Commission means the act of committing, doing or performing the act of perpetrating." At no point in time has the state even claimed, let alone proved, that Morris was murdered by petitioner while petitioner was engaged in the commission of the murder of Turner. Accordingly, it is clear that imposition of the death penalty could not have been imposed pursuant to the "while engaged in the commission of..." clause of the statute.

Second, the offense must have been committed while "the offender" was engaged in other specified acts. The legislative intent here is plain, viz: there must be a nexus between the elements of a capital felony performed by the defendant and the murder in question. The language of the statute itself requires that the underlying felony be "committed" by "the offender." However, petitioner has subsequently been acquitted of the murder in Habersham County, Georgia, which serves as the basis of the [redacted](b)(2) finding. The Georgia Supreme Court did not view this as any problem in affirming petitioner's sentence of death. Astonishingly, the court saw no problem in establishing the requisite nexus between the two crimes, irrespective of the acquittal.[the Georgia Supreme Court's affirmance made no mention of the requirement of the statutory language itself; or the necessity that "any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." Gardner v Florida, supra at 358.] The Court relied instead on the language in Hooks v State,233 Ga. 149(1979), that the Georgia death statute "does not require a conviction to find aggravated circumstances." Id. at 151.*

*Hooks also involved a plea of guilty which resulted in a death sentence.

No authority for this statement was cited, nor was it explained in any way.

It is readily apparent, however, that a lack of conviction is legally separate and distinct from acquittal. A pending case, or a "lack of conviction" is somewhat of a legal vacuum, e.g. there has been no disposition of the charges, and no resolution of the reasonable doubt requirement of a conviction. An acquittal, on the other hand, is defined as the "legal and formal certification of the innocence of a person..." (Blacks Law Dictionary, 4th Edition) and is a determination of the lack of proof beyond a reasonable doubt necessary for a conviction. If, as required by Code Ann. §27-2534.1(c), an aggravating circumstance must be found to exist beyond a reasonable doubt, then all elements therein must also be found to exist beyond a reasonable doubt. In petitioner's case, he was acquitted of the underlying offense, a certification that the state failed beyond a reasonable doubt. Whether "different triers of fact may reach different results" means nothing if the elements of the statutory requirements for imposition of the death sentence cannot be met.

The death sentence based on §(b)(2) cannot stand in light of the above, and the necessity for greater reliability required in death cases, Woodson v North Carolina, supra; Gardner v Florida, supra. This expansive construction of §(b)(2) in its application to the facts of petitioner's case suffers from the same overbreadth as the construction of §(b)(2) in Godfrey (see below) and must be reversed.

(B) THE GODFREY ISSUE.

The decision in petitioner's case, which also rested on a §(b)(2) finding, was affirmed by the Georgia Supreme Court prior to this Court's decision in Godfrey, supra. On June 24, 1980, without any notice to counsel that it was re-examining this case, the Georgia Supreme Court issued an Addendum to its initial affirmance in light of Godfrey. The Court affirmed the death sentence finding "material differences between Godfrey and the case under review" (245 Ga. at 880) and that Petitioner's actions were "out of the category of 'ordinary murders'". 245 Ga. at 881.

As a general proposition, the plurality decision in Godfrey decided that the United States Constitution imposes substantive limits on the state's ability to construe broadly the language of §(b)(7). Once a limiting construction is deemed to be constitutionally required, the state must ensure that these limits are respected. Thus, Justice Stewart noted that the Georgia Supreme Court has a "responsibility to keep section §(b)(7) within constitutional bounds." Godfrey, 110 S Ct. at 1765. After proclaiming the need for a limiting construction of § (b)(7), the plurality launched into an extended discussion of the Georgia case law interpreting section §(b)(7) to determine what, if any, narrowing construction had been supplied by the Georgia Supreme Court. The plurality opinion stated that the Georgia Supreme Court had reached three separate but consistent conclusions concerning this section: (a) that the evidence that the offense was "outrageously or wantonly vile,

horrible or inhuman" had to demonstrate "torture, depravity of mind, or an aggravated battery to the victim"; (b) that the phrase "depravity of mind" comprehended only the kind of mental state that led the murderer to torture or commit an aggravated battery before killing his victim; and (c) that the word "torture" must be construed in pari materia with "aggravated battery" so as to receive evidence of serious physical abuse of the victim before death. 100 S.Ct. at 1766.

The plurality ascribed its tripartite interpretation of (b)(7) to the Georgia Supreme Court's opinion in Harris v State 237 Ga. 718 (1976), and Blake v State, 239 Ga. 292 (1977).*

In Petitioner's case - not cited in any of the Godfrey opinions - the Georgia Supreme Court simply chose not to apply any of these criteria. Fair, supra, does discuss the interpretation of Section (b)(7); but it directly contradicts the Harris-Blake criteria that, in the view of this Court in Godfrey, has been the Georgia law since 1977.

The trial court found that the murder in petitioner's case was outrageously and wantonly vile, horrible and inhuman, in that it involved depravity of mind on the part of the defendant. (T-492-494). In language that directly refutes its statement in Blake, the Georgia Supreme Court ruled that:

*The crucial language of Blake is as follows: "That is to say, the depravity of mind contemplated by the statute is that which results in torture or aggravated battery to the victim." 239 Ga. at 299.

> "The statute §(b)(7) is worded in the disjunctive, not the conjunctive. It is not required that a trier of fact find the existance of each disjunctive phrase of the statute, only that at least one phrase of the first clause of the statute exists due to the existence of at least one phrase of the second clause of the statute." 245 Ga. at 872.

The court concluded its treatment of this issue by stating, "Furthermore, this court has upheld an identical finding of this statutory aggravating circumstance in Corn v State, 240 Ga. 130 (240 S.E.2d 694)(1977)." Id. at 872. In Corn, the court merely followed its all-too-common practice of simply quoting the finding of §(b)(7) and concluding without further discussion that "the evidence supports the statutory aggravating circumstances found."

Contrary to the statement of Blake, a finding of "depravity of mind" was not wholly independent and separable from torture and aggravated battery! Fair is certainly clear in that §(b)(7) is to be applied in the disjunctive. Justice White might well be surprised by this language in Fair as he declared in his Godfrey dissent, "Indeed, the Georgia Supreme Court has expressly rejected an analysis that would apply the provisions disjunctively...An analysis that, if adopted would arguably be assailable on constitutional grounds." Godfrey v Georgia, 100 S.Ct. at 1778 (White, J., dessenting)(emphasis added) See also, Stromberg v California, 238 US 359, 367-70(1931). Since the Georgia Supreme Court did explicitly and unmistakeably adopt this position in Fair, Justice White apparently would find the Georgia Court's construction of §(b)(7) in Fair constitutionally repugnant.

But, when faced in Fair with a finding of "depravity of mind" where no torture or aggravated battery to the victim occured before death*, the court entirely repudiated the notion that the depravity of mind contemplated by the statute is that which results in torture or aggravated battery to the victim. Of course, if the Blake language had governed, the finding of §(b)(7) could not have been sustained. Thus, the Georgia Supreme Court reached two wholly contradictory conclusions about section (b)(7) in Blake and Fair.

This Court's narrow construction of §(b)(7), derived from Harris and Blake, specified that a finding of "Depravity of mind" requires that the defendant possess a mental state causing him to torture or commit an aggravated battery against the victim. This requirement is not satisfied unless the defendant intentionally inflicted serious physical abuse upon the victim before death. Godfrey, supra, 100 S.CT. at 1766. The plurality pointed out that these requirements were not met in Godfrey. Clearly, they are also not met in the case sub judice.

Godfrey is pivotal in determining which acts do not constitute torture or aggravated battery. First, an aggravated

*Lack of factual support for this proposition is apparent in Petitioner's case from the testimony of Dr.Byron Dawson, pathologist at the Georgia State Crime Lab:"...I saw no evidence that would be...or, no injuries, or other findings that would be consistent with a torture." (T-145)

Dr.Dawson's testimony revealed further that, although the victim was shot at least three times, two shots were fired into the head and if fired first, the victim was rendered unconscious and had no conscious sense of pain. (T-136, 137,143-141). The fact that no physical suffering, torture, or injury prior to death occured was not contested by the State (Respondents brief, p.24). Further, the trial judge in his report to the Georgia Supreme Court responded negatively to the question of whether or not the victim had been physically harmed or tortured.(R-98).

battery cannot exist where the victim has not suffered any physical injury preceding his death. 100 S.Ct. at 1766. Thus, any murder resulting in instantaneous death, regardless of the manner by which this result is accomplished or the gruesomeness of ensuing scene, will not be considered to involve torture. 100 S.Ct. at 1767, n.16.

Accordingly, under this criteria, "depravity of mind" comprehends only the kind of mental state that leads to torture or aggravated battery before killing the victim, the absence of torture or aggravated battery in petitioner's case, as in Godfrey, established conclusively that Petitioner did not have the requisite "depravity of mind" sufficient to fulfill the requirements of [redacted](b)(7).

Having reached this conclusion, the reversal of petitioner's death sentence is mandated by well-established constitutional principles. First, the Georgia Supreme Court's affirmance of Fair's death sentence violates the basic precept that the state must prove every element of an offense constituting an aggravating circusmtance beyond a reasonable doubt. In re Windship, 397 US 358 (1970); Jackson v Virginia, 443 US 307(1979); Ga. Code Ann. 27-2534.1(c). The conclusion that the circumstances of this case do not meet the criteria for imposition of death is constitutionally equivalent to the statement that the state has failed to prove every element of [redacted](b)(7) beyond a reasonable doubt.

Second, since there was no evidence that torture or aggravated battery existed, Petitioner's death sentence also violates the "no evidence" rule of Thompson v Louisville, 362 US 199 (1960), in derogation of Fairs right to due process of law. This absence of evidentiary support for the finding of section (b)(7) is, by definition, arbitrary: Schware v Board of Bar Examiners, 353 US 232, 239 (1957), and cannot supply any principled way to distinguish a " ...case in which the death penalty is imposed, from the many cases in which it was not."

Third, the Petitioner's death sentence is violative of his right to due process of law, as announced in Bouie v City of Columbia, supra. See II, infra. The affirmance of Fair's death sentence is a change in the court's construction of the statutory aggravating circumstance. In effect, conduct that previously would not have been considered as included within the meaning of section (b)(7) under the Harris - Blake criteria was brought within its contours by the court's new interpretation in Fair. It is well established that such unforseeable judicial enlargement of a criminal statute violates due process where applied retroactively. See III, infra.

In its Addendum, the Georgia Supreme Court has simply ignored the Godfrey analysis of the Harris - Blake criteria. Ignoring the explicit limitation requiring "evidence of serious

physical abuse of the victim before death" (100 S Ct. 1766, emphasis added) the court ruled that a finding of "depravity of mind" was justified because the victim was abused after death.* 245 Ga. at 880. As authority for this belated proposition, the court cited Hance v State, 245 Ga. 856; decided June 24, 1980, the same day as the Fair Addendum and 2½ months after the decision in Fair (April 9, 1980). Further, the Hance opinion, written by Justice Hall, offers no support for this proposition, but merely states it in conclusory fashion. Hance, supra, at 862. Again, the constitutional infirmity of this proceedure is obvious, as a proper trial interpretation of section (b)(7) is a defect that "could not be cured by the post hoc narrowing construction of an appellate court." Godfrey, supra, 100 S Ct. at 1769 (Marshall, J.)

One final point must be made. In the Fair Addendum, the Georgia Supreme Court noted that when a sentence of death is based on finding of more than one aggravating circumstance, the invalidity of one does not preclude the imposition of the death sentence on the basis of the other aggravating circumstance. Fair, supra, at 880. In Gates v State, 244 Ga.

*Evidence was presented that, after death, petitioner's accomplice Dexter Thomas, (see Thomas v State, 246 Ga. 484 (1980)) leaned into Morris's car and cut his throat with a pocket knife. In Fair, the Supreme Court acknowledged this as fact in its Addendum by stating "Appellants accomplice cut the victim's throat and then burned the body". Fair, 245 Ga. at 880-881. Evidence at trial was much disputed on both issues; i.e. evidence indicated that Thomas cut victim's throat and set fire to the car containing the body of the victim. (T-414-417)

(1980), the Court ruled that where the jury found three aggravating circumstances, one of which was subsequently held unconstitutional, the sentence of death could not stand on the basis of the other two. Id. at 406. Thus, when discretion is exercised in favor of death on the basis of finding of more than one aggravating circumstance, the failure of any one circumstance invalidates the death sentence. The contrary view is necessarily predicated on the purely speculative argument that the discretion would have been exercised the same way even if one of the essential props for the death penalty had been absent. The affirmance of a death sentence on such a speculative basis violates both the due process clause and the Eighth Amendment. See, Hicks v Oklahoma, 447 US 343 (1980); Godfrey, supra, 100 S Ct. at 1769 (Marshall, J., concurring).

For the foregoing reasons, Petitioner's sentence of death must be vacated.

V. WHETHER INTRODUCTION AT PETITIONER'S SENTENCING TRIAL OF THE TESTIMONY OF MICHAEL MARABLE DENIED PETITIONER'S RIGHT TO DUE PROCESS OF LAW IN THAT SAID TESTIMONY WAS GIVEN PURSUANT TO PROMISES OF LENIENCY GIVEN TO HIM WHICH WERE NOT DISCLOSED TO THE SENTENCING COURT.

The habeas court erred in denying Petitioner's challenge to the testimony of witness Marable because, contrary to the conclusion of the habeas court, there were promises of leiency known to the prosecution, but undisclosed to the trial court.

The record shows that on or about August 9, 1979, witness Marable was apprehended after escaping from the Forsyth County, Georgia, jail with Petitioner. See Stroberg deposition, p.4

5, and Exhibit 1 attached thereto. Marable gave a taped interview on August 9, 1979, to prosecutor Stroberg after promises of reduced sentences in pending cases (H.T.42); favorable recommendations to the sentencing judge (H.T.42-43 Stroberg deposition p.11; Exhibit 1, p. 27); and special promises not to prosecute his girlfriend for aiding his escape (H.T.48); and prison assignment (Stroberg deposition, Exhibit 1, p. 28).

Further, on August 10, 1979, witness Marable pled guilty in the Superior Court of Forsyth County, Georgia, to the offenses of Criminal Interference with Government Property, Escape, Motor Vehicle Theft (Two Counts), and Burglary. In his Petition to Enter Plea of Guilty (H.T.84), Marable checked yes for question number 30: Has any plea agreement been made by you with anyone which causes you to plead GUILTY? And he described the agreement as a sentence of "10 years to serve 5 - and agreement to testify for the State in any cases I have knowledge of" (H.T.84). The actual sentence entered by the Court is reflected in the habeas transcript at pages 81 and 82. It is to be noted that, as a special condition to Marable's sentence, he was required to:

> "...testify fully and truthfully to... his knowledge of conversations had with Keith Fair concerning the murders with which Fair is charged..."

Petitioner plead guilty on August 13, 1979, and witness Marable testified the following day. Further, the District Attorney, upon specific request by Defense Counsel, denied any knowledge of promises made to any witness. (T.T.41)

Of course, the criminal defendant has a constitutional right to the disclosure of all favorable or exculpatory evidence in the possession of the government, pursuant to the due process clause of the Fifth and Fourteenth Amendments. Brady v Maryland, 373 US 83(1963). This right exists whether such evidence is material to the defendants guilt or to mitigation of his punishment, and "irrespective of the good faith or bad faith of the prosecution". Brady, supra, at 87.

A specific and timely request was made for this material, and the district attorney specifically denied any knowledge of or possession of any. (T-41) However, the obligation to disclose favorable evidence is that of the government, and failure to disclose such information is not excused merely because the prosecutor did not have actual knowledge of it. Barbee v Warden, 331 F2d 842 (4th Cir 1967); Rhinehart v Rhay; 440 F2d 725 (9th Cir 1971); United States v Bryant, 439 F2d 642 (D.C. Cir 1971). See also United States v Roberts, 339 F2d 646 (2nd Cir 1968).

Indeed, in Giglio v United States, 405 US 150 (1972), a promise of leniency made to a witness by the prosecuting attorney conducting a grand jury investigation was attributed to a different prosecutor presenting the case at trial.

This constitutional requirement extends to evidence "favorable to the accused either direct or impeaching". Willaims v Dutton, 400 F2d 797 (5th Cir. 1968). Specifically,

courts have held the criminal record of prosection witnesses must be produced, In re Ferguson, 489, F2d 1234 (9th Cir.1971); and any indication of the unreliability of government witnesses, Mesarosh v United States 352 US 1(1956), must also be produced.

Further, in Giglio v United States, supra, this Court held that promises of leniency or non-prosecution to key government witnesses is material discoverable under Brady. Accord Allen v State, 128 Ga. App. 361(1973), where the Georgia Court of Appeals recognized that it is "well settled that evidence of an expectation of leniency by a prosecution witness who is or could be charged or convicted of a crime is relevant to the question of his credibility", and that "the jury is entitled to know of it; the prosecutor has a duty to disclose it; and the failure to make this disclosure violates due process and requires the reversal of the conviction and a remand for a new trial." Id. at 364.

A prosecutor has many ways in which to coax cooperative testimony from a reluctant witness: immunity grants (Annunziato v Manson, 566, F2d 410(2nd Cir 1977)); United States v Librach, 520 F2d 550 (8th Cir 1975)); dropped or reduced charges (Giglio, supra, Blankenship v Estelle, 545 F2d 510 (5th Cir. 1977)); or monetary payments (United States v Jackson, 579 F2d 553 (10th Cir 1978); United States v Librach, supra. He also may make a general promise to bring the witness' cooperation to the attention of the sentencing judge, as in the instant case (see also United States v Harris, 498 F2d 1164(3rd Cir. 1974)); or make specific recommendations for

reduced sentences (Napue v Illinois, 360 US 246 (1959).

Whatever the method, by altering a prospective witness' perception of his self-interest, a promise or inference of favorable treatment induces him to further the trial process rather than resist it.

Despite assertions to the contrary, promises of favorable treatment or sentences conditioned on "cooperative" testimony create a clear incentive for falsification. See United States v Meinster, 619 F2d 1041, 1044-45(4th Cir 1980); Boone v Paderick, 541 F2d 447, 448 (4th Cir. 1976). The wintess now has a compelling motive to give testimony harmful to the accused. Indeed, vague or tentative promises may intensify this incentive for falsification. Thus, when the prosecutor tells the prospective witness; "I'll do what I can for you, but I'm not promising anything," (Stroberg deposition, p.11, 19,20; Exhibit 1, p.25-28), the witness may see leniency as a function of the damning quality of his testimony. Boone v Paderick, supra ("The more uncertain the agreement, the greater the incentive to make the testimony pleasing to the promisor.") A prosecutor makes a promise of favorable treatment, whether vague or explicit, precisely because of its anticipated impact of the wintess' testimony. United States v Gerard, 491 F2d 1300 (9th Cir. 1974).

Thus, the courts agree that a prosecutor's failure to disclose favorable treatment may violate due process because it is essential for the trier of fact to know of such a promise in order to evaluate testimony. See Giglio v United States

supra; Napue v Illinois, supra. Further, failure to provide such crucial evidence deprives the defendant of his "major weapon" in attacking the credibility of a witness against him, and will result in the testimony being accorded more weight than it merits. See, United States v Blackwood, 456 F2d 526, 530 (2nd Cir.), cert. den, 409 US 863 (1972); Napue v Illinois, supra, at 269.

The Georgia Supreme Court opinion clearly shows that the testimony of Marable was a key factor in that court's affirmance of Petitioner's death sentence. Fair, supra, at 869, 873, 880. Petitioner and Marable were recaptured after their escape on or about August 9, 1979; and on that date Marable gave his statement to Assistant District Attorney Stroberg (See, Exhibit 1 to deposition of Stroberg). Between the time of his statement and the trial of Petitioner's case, Marable plead guilty and was sentenced in Forsyth County, Georgia, - a certified copy of that sentence is on record in this case (H.T. 81-82). That sentence reflects that Marable plead guilty and received a sub-stantially lighter sentence than could have been imposed, on the specific condition that he testify against Petitioner. His testimony at Petitioner's hearing, while somewhat ambiguous, clearly shows that his testimony at Petitioner's trial was motivated by (a) the light sentence he received, and (b) the fact that his girlfriend was not prosecuted regarding his escape. On page 24 of his statement, Marable indicates he will testify against Fair "if ti will help me...," and clearly it did. No copy of his sentence was furnished to trial counsel, nor were they aware

of the conditions in it, even though they specifically requested this material.

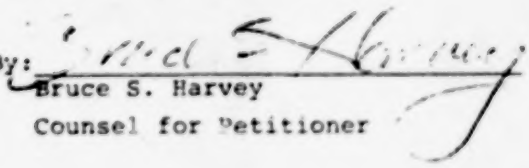
The non-disclosure established, the proper standard for review is, whether there was a reasonable likelihood that disclosure could have affected the trier of fact in evaluating witness credibility. United States v Butler, 567 F2d 885 (9th Cir. 1978). Since there was such a likelihood in the instant case, the sentence should be set aside and the case remanded for a new trial.*

* Cf. United States v Agrus, 427 US 98 (1976); Garrison v Maggio, 540 F2d 1271 (5th Cir, 1971) both distinguishing between non-disclosure of exculpatory evidence and impeaching evidence. Distinction can, and should be, drawn between the type of nondisclosed evidence involved. A strong case can be made that undisclosed promises of favorable treatment are uniquely within the discretion of the prosecutor's deliberate actions; and a prosecutor who fails to disclose such promises deliberately corrupts the truth-seeking process. Appellate review focusing on the importance of the witness testimony ("materiality") is faulty in that (a) it substitutes the court's judgment for that of the jury, and (b) the promise of favorable treatment itself amounts to an implicit admission that the witness' testimony is important to the case. There is no reason not to disclose: if it is so unimportant, disclosure will not be harmful to the case; and, if it is important, disclosure is constitutionally required.

CONCLUSION

For the reasons shown, a writ of certiorari should issue to review the judgment and opinion of the Superior Court of Butts County, Georgia.

Respectfully submitted

By: 
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IN THE SUPERIOR COURT OF BUTTS COUNTY

STATE OF GEORGIA

KEITH FAIR,	:	
	:	
PETITIONER	:	HABEAS CORPUS
	:	FILE NO. 5100
VS.	:	
	:	
WALTER D. ZANT, WARDEN, GEORGIA DIAGNOSTIC AND CLASSIFICATION CENTER,	:	
	:	
RESPONDENT	:	

O R D E R

This Habeas Corpus challenges the constitutionality of Petitioner's restraint and the imposition of the death penalty by the Superior Court of Hall County. Petitioner pled guilty to murder. After a presentencing trial on the issue of punishment, the trial judge found the existence of two statutory aggravating circumstances and sentenced Petitioner to death. Petitioner's plea of guilty and death sentence were affirmed by the Supreme Court. Fair v. State, 245 Ga. 868 (1980). Upon reconsideration in light of Godfrey,[1] the Supreme Court reaffirmed Petitioner's death sentence. Fair v. State, 245 Ga. at 879 (Addendum). Certiorari was denied by the Supreme Court of the United States.

The Petition contains 18 numbered paragraphs, of which 9 allege substantive claims for relief (9-17).

[1] Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980).

The Court will rule on these claims for relief by paragraphs corresponding numerically to the paragraphs in the Petition.

The record in this case consists of the transcript of the proceedings before this Court on July 15, 1981; the deposition of Roland Stroberg; and the transcript and record of Petitioner's trial in the Hall County Superior Court.

9.

In paragraph 9, Petitioner contends he was denied effective assistance of counsel in violation of the Sixth, Eighth, and Fourteenth Amendments and the Georgia Constitution. Specifically, Petitioner claims his trial counsel were ineffective in advising him to plead guilty, that he could withdraw his guilty plea if a death sentence were imposed and be tried by a jury; and that counsel were not adequately prepared to meet the evidence of the Habersham County incident.

FINDINGS OF FACT

Petitioner was represented at trial and on appeal by George Brinson and Michael Casper. Mr. Brinson was appointed to represent Petitioner on the Hall County charges. (H.T. 9). After he requested assistance, Mr. Casper was appointed as co-counsel. (H.T. 10).

Mr. Brinson testified that after his initial conference with Petitioner, both attorneys met with Petitioner at least 6 or 7 times, with each conference lasting at minimum an hour. (H.T. 9, 19). At these

conferences they discussed with Petitioner the results of their investigation and told him the State had an almost iron-clad case against him. (H.T. 19). Counsel had gotten the list of State's witnesses, approximately 30 or 40 people, and had talked to as many witnesses as they could locate. (H.T. 9-10). The prosecutor and his assistant were very cooperative in advising Counsel of the evidence against Petitioner. (H.T. 21). Counsel attempted pretrial negotiations, but the State refused. (H.T. 10). Counsel determined no defenses were available. (H.T. 64). They also consulted with other attorneys who agreed that Petitioner had a better chance to get a life sentence before a judge. (H.T. 19). Finally, based upon their extensive legal research, they concluded under Ga. Code Ann. §27-1404, that Petitioner had the absolute right to withdraw his guilty plea after sentence was pronounced but before it was filed with the clerk. (H.T. 23, 69). They prepared a contingency plan for withdrawing Petitioner's plea (H.T. 12-15, 66-69). Counsel had discussed with Petitioner the pros and cons of each method of trial, and Petitioner agreed to waive a jury trial and rely on the contingency plan. (H.T. 22-23, 53, 63, 66). When the trial judge imposed a death sentence, Counsel attempted to withdraw Petitioner's plea, but the trial judge refused to allow withdrawal. (H.T. 12-15, 66-69).

As to the Habersham County charge of murder, Counsel filed a Motion in Limine to exclude

any evidence connected with the Habersham incident. (R. 72-74). The Motion was denied. (H.T. 71). All Habersham evidence was admitted over objection. (T.T. 78).

CONCLUSIONS OF LAW

The Sixth Amendment right to counsel means "...not errorless counsel, and not counsel judged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance." MacKenna v. Ellis, 280 F.2d 592 (5th Cir. 1960); Pitts v. Glass, 231 Ga. 638 (1974).

Petitioner's Counsel easily meet this test. They were experienced in the trial of criminal cases. They prepared for and advocated Petitioner's cause in a reasonably effective manner. The effort they put forth was certainly reasonably effective within the meaning of the standard.

Petitioner has claimed Counsel were ineffective in advising him he could withdraw his guilty plea in the event of a death sentence being imposed and then be tried by a jury.

The Court finds the contingency plan for withdrawing Petitioner's guilty plea to be a strategy. Strategic and tactical decisions are the exclusive province of a lawyer after consultation with his client. Reid v. State, 235 Ga. 378 (1975).

Counsel found themselves in an impossible situation. Petitioner had admitted his guilt. (H.T. 20). Counsel

had determined that no defenses were available. The contingency plan for withdrawing Petitioner's plea of guilty was based upon the law as it existed at the time. The fact that the Supreme Court decided on direct appeal that Ga. Code Ann. § 27-1404 does not apply to the capital sentencing procedure does not mean that Counsel was ineffective in giving advice based on the law as it existed at the time. In fact, the Court of Appeals has recognized there is no duty on counsel to anticipate this type change in the law. Gray v. State, 157 Ga. App. 745, 746 (1981).

That the advice given Petitioner turned out to be bad does not make the giver of that advice ineffective within the meaning of the Sixth Amendment. Petitioner's situation was such that any plan adopted by Counsel involved risks. The fact that the plan did not work does not mean that Counsel were ineffective.

Petitioner has also suggested Counsel were ineffective in failing to meet the Habersham County murder evidence. Counsel filed a Motion in Limine to exclude any such evidence. They objected to its admission. They had talked to all the witnesses they could locate. (H.T. 29, 74). Counsel did all they could do short of trying the Habersham case. Petitioner has not shown how any lawyer could have met the evidence.

Accordingly, the claim for relief in paragraph 9 is found to be without merit.

10.

In paragraph 10, Petitioner claims he was denied due process of law in violation of his Fifth and Fourteenth Amendment rights by the trial court's denial of his right to withdraw his plea of guilty.

The Supreme Court has already concluded that Ga. Code Ann. §27-1404 relating to withdrawal of guilty pleas as a matter of right does not apply to guilty pleas tendered in capital cases. Fair v. State, 245 Ga. at 878.

Accordingly, this allegation is found to be without merit.

11.

See paragraph 10.

12.

In paragraph 12, Petitioner contends his guilty plea was involuntarily made, in violation of his constitutional rights, because the plea was based on his trial counsel's assurance that the plea could be withdrawn as a matter of right.

FINDINGS OF FACT

Prior to accepting Petitioner's plea of guilty, the trial court "exhaustively examined the appellant to determine if the plea was voluntarily and intelligently given"; informed Petitioner and his counsel that the Court was not conscientiously imposed to capital punishment and would impose a death sentence if the facts warranted

it; recessed to allow Petitioner to confer again with his counsel; and thereafter accepted Petitioner's plea of guilty. Fair v. State, 245 Ga. at 875; T.T. 5-19.

CONCLUSIONS OF LAW

The Court has already concluded Counsel's advice on the issue of withdrawal of a plea was based on the law as it existed at that time. (See paragraph 9). A voluntary plea of guilty intelligently made in the light of the then applicable law does not become vulnerable because later judicial decisions indicate that the plea rested on a faulty premise. Brady v. United States, 397 U.S. 742, 90 S.Ct. 1463, 25 L.Ed. 2d 747, 761 (1970).

Here, Petitioner was aware of his rights and knew there was a chance he could receive a death sentence. (H.T. 21-22, 58, 66, 69). The plan to withdraw Petitioner's plea of guilty was a risk which Petitioner apparently was willing to take. Because he does not like the result is not sufficient reason to invalidate his plea.

Accordingly, this claim for relief is found to be without merit.

13.

In paragraph 13, Petitioner claims the novel construction of Ga. Code Ann. §27-1404 by the Supreme deprived him of due process of law.

The decision of the Supreme Court as to whether or to what extent Ga. Code §27-1404 applied to Georgia's

death penalty statute was a question of first impression. Fair v. State, 245 Ga. at 876. The Court concluded that a guilty plea may not be withdrawn as a matter of right in a capital case other than treason or aircraft hijacking. Fair v. State, 245 Ga. at 878.

The Supreme Court left intact the line of procedural decisions of the Court of Appeals on the right to withdraw a guilty plea without approving or disproving them. Fair v. State, 245 Ga. at 878, fn. 5. The reversal of which Petitioner complains [the line of procedural decisions under §27-1404] occurred in a subsequent decision, State v. Germany, 246 Ga. 455 (1980), and is irrelevant to Petitioner's case.

Accordingly, this claim for relief is found to be without merit.

14.

The issue raised in paragraph 14 has already been decided adversely to Petitioner on direct appeal. Fair v. State, 245 Ga. at 871.

15.

The issue raised in paragraph 15 has already been decided adversely to Petitioner. Fair v. State, 245 Ga. at 879 (Addendum).

16.

In paragraph 16, Petitioner claims violation of his constitutional rights by the admission of the

testimony of Michael Marable, testimony alleged to be given in exchange for an undisclosed promise of leniency.

FINDINGS OF FACT

At Petitioner's sentencing trial, Michael Marable testified that he had not been promised anything in return for his testimony. (T.T. 366). At the habeas hearing, Mr. Marable initially stated that he based his testimony on some promises by the prosecutor (H.T. 44), then later stated that the prosecutor had made no promises but had told Mr. Marable he would write a recommendation to the judge in Forsyth County concerning the pending charges against Mr. Marable. (H.T. 51).

Roland Stroberg, the prosecutor in this case, denied making any promises or statements to Mr. Marable. (Stroberg Depo., 7-8). Mr. Stroberg told Mr. Marable that it "took a lot of guts to testify" and that he would let the Forsyth County Judge know Mr. Marable had testified. (Stroberg Depo., 11).

CONCLUSIONS OF LAW

Petitioner has made no showing of any undisclosed promise of leniency. Further, the Court cannot assume an agreement existed merely because of the subsequent disposition of criminal charges against a witness for the State. Fleming v. State, 236 Ga. 434, 438 (1976).

Accordingly, the allegation in paragraph 16 is found to be without merit.

17.

The issue in paragraph 17 has already been decided adversely to Petitioner. Fair v. State, 245 Ga. at 869 (2).

WHEREFORE, all allegations in the Petition having been found to be without merit, the Petition is denied.

This 20 day of October, 1981.

ALEX CRUMBLEY
JUDGE SUPERIOR COURTS
FLINT JUDICIAL CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1981

KEITH FAIR,

Petitioner

vs

WALTER D ZANT, Warden
Georgia Diagnostic and
Classification Center,

Respondent

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Petitioner, KEITH FAIR, who is now held in the Georgia Diagnostic and Classification Center, Jackson, Georgia, asks leave to file the Attached Petition for Writ of Certiorari to the Superior Court of Butts County, Georgia, without prepayment of costs and to proceed in forma pauperis.

Affidavit of Petitioner's counsel in support of this motion is attached hereto.

Bruce S. Harvey

Bruce S. Harvey

3349 Piedmont Road
Suite 203
Atlanta, Georgia 30305
(404) 262-3204

RECEIVED
MAR 8 1982
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1981

No. 81

KEITH FAIR,

Petitioner

vs

STATE OF GEORGIA,

Respondent

PAUPER'S AFFIDAVIT

Personally appeard before the undersigned officer duly authorized to administer oaths BRUCE S. HARVEY; who, on being sworn, deposes and says that he is presently counsel for Petitioner in the above-styled Petition of Writ of Certiorari and makes this Affidavit for use in filing same and that the facts contained herein are based upon his personal knowledge acquired while serving as counsel for Petitioner.

-1-

I am counsel for Petitioner in his Petition for Writ of Certiorari to the Superior Court of Butts County, Georgia.

-2-

Petitioner is currently incarcerated in death row in the Georgia Diagnostic and Classification Center, Jackson, Georgia.

-3-

Counsel was appointed to represent Petitioner in Habersham County, Georgia, on or about August 7, 1979. Since that time Petitioner has proceeded in forma pauperis to the Supreme Court of Georgia, to this Court, and in the Superior Court of Butts County, Georgia.

-4-

Petitioner is not curretnly employed; has had no income whatsoever in the past twelve months; and owns no checking or savings accounts, stocks, bonds, automobiles, or other valuable property:

WHEREFORE, Affiant prays that Petitioner have leave to proceed in this Court on Petition for Certiorari in forma pauperis.

Bruce S. Harvey

Bruce S. Harvey

Sworn and subscribed to before me this 5 day of March, 1982.

Notary Public

3349 Piedmont Road
Suite 203
Atlanta, Georgia 30305
(404) 262-3204

NO. 81-6338

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

KEITH FAIR,

Petitioner,

v.

WALTER D. ZANT,
WARDEN, GEORGIA
DIAGNOSTIC AND
CLASSIFICATION CENTER,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPERIOR COURT OF BUTTS COUNTY, GEORGIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

NICHOLAS G. DUMICH
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QUESTIONS PRESENTED

I.

Whether or not Petitioner's plea of guilty to the offense of murder was voluntarily and intelligently entered when there is no question about the reliability or truthfulness of his sworn admissions of guilt in open court, when the trial judge and Petitioner's own counsel thoroughly and fully advised him of his constitutional rights, but when defense counsel erroneously advised him pertaining to his right to withdraw his plea following oral announcement of sentence?

II.

Whether or not the trial court's refusal to allow Petitioner to withdraw his guilty plea after pronouncement of sentence, and the Georgia Supreme Court's affirmance of said ruling, operated to deprive Petitioner of his due process rights under the Fifth and Fourteenth Amendments of the United States Constitution?

III.

Whether the evidence presented during Petitioner's sentencing hearing was sufficient to support a finding of a statutory aggravating circumstance under Ga. Code Ann. § 27-2534.1(b)(2), when the murder in the instant case had been perpetrated to eliminate an eyewitness to another murder which Petitioner had committed earlier on the same evening?

IV.

Whether or not Petitioner's perpetration of a previous murder, which was proven beyond a reasonable doubt in the instant case during the sentencing phase of Petitioner's bifurcated guilty plea hearing, may still remain a aggravating circumstance under Ga. Code Ann. § 27-2534.1(b)(2), when Petitioner was later tried before a jury in another county, and was acquitted of said previous murder?

V.

Whether the evidence presented during the sentencing phase of Petitioner's bifurcated guilty plea hearing was sufficient to support the trial judge's finding of statutory aggravating circumstances under Ga. Code Ann. § 27-2534.1(b)(7) when the trial judge made no specific finding that the victim suffered torture or aggravated battery.

VI.

Whether or not the state prosecutors withheld favorable, impeaching evidence concerning one of the State's witnesses during the sentencing phase of Petitioner's bifurcated guilty plea proceeding, in violation of Petitioner's due process rights?

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PART ONE

STATEMENT OF THE CASE

The Petitioner, Keith Fair, was indicted by the July Term, 1979 Hall County, Georgia Grand Jury for the shooting murder of Jackie Morris which had occurred on May 9, 1979. Petitioner pled guilty on August 14, 1979 and following a two day sentencing hearing the trial court imposed the death penalty finding the existence of two statutory aggravating circumstances under Ga. Code Ann.§§ 27-2534.1(b)(2) and (b)(7). Petitioner's conviction and sentence were affirmed by the Georgia Supreme Court on direct appeal, and this Court thereafter denied his original petition for a writ of certiorari and petition for rehearing. Fair v. State, 245 Ga. 868, 268 S.E.2d 316 (1980), cert. den., 449 U.S. 986 (1981), rehng. den., 449 U.S. 1104 (1981).

Following the denial of the petition for certiorari and rehearing, a new execution date was set for June 9, 1981. Petitioner then filed on June 5, 1981 in the Superior Court of Butts County, Georgia a request for a stay of execution and petition for habeas corpus. Following an evidentiary hearing which was held on July 14, 1981 in the Superior Court of Butts County, Georgia state habeas corpus relief was denied in an order filed on October 21, 1981. The Georgia Supreme Court denied Petitioner's application for a certificate of probable cause to appeal on January 6, 1982. Thereafter, Petitioner filed this second petition for a writ of certiorari.

PART TWO

STATEMENT OF THE FACTS

On August 14, 1979, the Petitioner and his attorneys appeared in the Superior Court of Hall County, Georgia to enter Petitioner's plea of guilty to the murder of Jackie Morris. Recognizing the gravity of the crime the trial court meticulously questioned the Petitioner during the hearing to insure that his plea was freely and voluntarily entered, with full knowledge of the consequences of said plea. (T. 5-16).[1/] After ascertaining that Petitioner was not under the influence of drugs or alcohol, the trial judge read the formal charges to the Petitioner and asked him if he had sufficient time to discuss the case with his attorneys. (T. 5-6). At the guilty plea hearing, and later at the state habeas corpus hearing, the Petitioner indicated that he and his attorneys had gone over and discussed a detailed guilty plea petition which fully advised him of all of his constitutional rights, indicated that he had not been coerced, threatened nor induced into entering his plea and which additionally advised him that the maximum punishment which he could receive for the offense was death by electrocution. (T. 6-7, HT. 59, 65, 22). It was established at the plea hearing beyond any doubt that Petitioner was fully aware that the trial court had the authority under Georgia law to impose the death penalty upon a guilty plea, and that the trial judge was not conscientiously opposed to capital punishment. (T. 10-13). Petitioner also indicated his

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1/ References to the pagination of the transcript of Petitioner's guilty plea and sentencing hearing in the Superior Court of Hall County, Georgia shall be referred to in this brief as (T. ____). References to the pagination of the habeas corpus transcript from the Superior Court of Butts County, Georgia shall be referred to as (HT. ___).

awareness that there was no plea bargain in existence between himself or his attorneys and the district attorney, relating to the sentence which might be imposed following his plea. (T. 11). With full knowledge that he was leaving his fate in the hands of the trial judge, the Petitioner expressed his desire to enter his plea of guilty. (T. 18-20). In his own words at the plea hearing, the Petitioner admitted that he had shot Jackie Morris in the head three times with a .22 caliber pistol, and his only explanation was that they were drunk and had a little argument. (T. 15).

Following the acceptance of Petitioner's guilty plea, the trial court heard testimony from twenty-one witnesses on the issue of punishment. Testimony was extensive, covering two days and approximately 400 pages in the transcript. The testimony established overwhelmingly, and beyond any scintilla of doubt, that the murder of Jackie Morris resulted from the Petitioner's attempt to conceal another murder which he had committed earlier that same night in Habersham County, Georgia. This was the murder of Edmond Hoyt Turner, alias "Beetle" Turner.

At this juncture it should be noted that at the time of the Petitioner's plea, he stood accused of murdering both Jackie Morris in Hall County, Georgia and "Beetle" Turner in Habersham County, Georgia. Hall and Habersham Counties are in different judicial circuits, and are served by different district attorneys. Although Petitioner stood indicted in Habersham County for the murder of Turner, that case had not been called to trial at the time of Petitioner's guilty plea in Hall County, Georgia to the murder of Morris. Prior to the

sentencing phase of Petitioner's bifurcated guilty plea proceeding, Petitioner's attorneys had been served with notice and were aware that the Hall County District Attorney in this case, intended to use evidence of the Habersham County murder as an aggravating circumstance in support of the death penalty.

The state's evidence during the sentencing phase showed that the Petitioner and several other individuals had congregated at the home of Dexter Thomas on the evening of May 8, 1977. Present were the Petitioner, Becky Nations (Petitioner's girl-friend), Jackie Morris, Sherill Land, and Dexter Thomas. (T. 91-92, 163-165, 192). "Beetle" Turner (the victim in the Habersham County murder) arrived a short time after the others. Witnesses stated that Turner apparently had recently been released from jail, and was angry at an individual named Morgan Whitlock, because Whitlock had been instrumental in Turner's being jailed. Earlier on May 8, 1977, Turner had been in a confrontation with Whitlock, had threatened him, and told Whitlock that he would return that evening. (T. 96-98).

Eventually, "Beetle" Turner, Jackie Morris, Dexter Thomas and the Petitioner left the Thomas house. (T. 194). Evidence was presented which showed that Turner gave the Petitioner a pistol, and had offered him some money in exchange for his help in burning Whitlock's trailer. Upon arriving at the trailer, the group found that Whitlock was absent, and the Petitioner and Jackie Morris then set the trailer on fire. (T. 103, 199).

After leaving Whitlock's place, the Petitioner told Turner that he wanted his money. (T. 199). Turner said he did not have

it at that time, but he would cash a check. (T. 199). Melody Tethrow, who worked at a local country store, confirmed that Turner had requested that she cash a $200.00 check, but she had only been able to cash a $100.00 check. (T. 87).

Fair and Turner continued to argue about the money as the group traveled in Morris' automobile with Fair driving. The argument climaxed when, after stopping the car, Fair shot Turner in the face without any warning. As described by eyewitnesses, Dexter Thomas, Turner and Fair had been arguing about the money and finally Turner stated, "I'll get you some more money after a while." Fair responded, "I'm getting tired of hearing your damn mouth run, you won't pay your debts or nothing . . . I'll teach you." At this point, the Petitioner drew the pistol, reached through the automobile window where Turner was sitting, and fired point blank into Turner's face. Fair then reached in, grabbed Turner by the hair, pulled him out onto the ground, laughed and again shot him in the head. (T. 201-202).

Testimony from a medical examiner and from a ballistics expert confirmed that the pistol was fired from between two and six inches from Turner's face. (T. 114, 117, 156-158).

After Turner had been shot, Fair directed the other two occupants of the vehicle to place Turner's body into the trunk of Morris' automobile. (T. 203). Petitioner now faced the problem of disposing of Turner's body, and doing something about Morris' bloodstained automobile. The trio returned to Thomas' house where they changed clothes. (T. 203-204, 249). At the Thomas' residence, the Petitioner, Morris and Thomas confided in Becky Nations and Sherill Land about Fair shooting Turner. (T. 167, 250).

After Fair changed clothes, he and Becky Nations left in their car, while Dexter Thomas and Sherill Land drove Turner's truck. Jackie Morris drove his bloodstained Mustang with Turner's body still hidden in the trunk. The plan was to dispose of Turner's body in a nearby lake. (T. 250-252).

Upon arriving at the lake, Turner's body was loaded onto his truck at the direction of the Petitioner, and the truck was driven into the water. (T. 167-168, 206-207, 252-253).

After Turner's body was disposed of, the five individuals headed towards Gainesville, Georgia. Dexter Thomas rode with Fair and Becky Nations, while Sherill Land rode with Jackie Morris in his Mustang. (T. 207). On the way to Gainesville, Fair asked Thomas, "Reckon what I ought to do with Jackie [Morris]." (T. 209). Thomas claimed to have suggested nothing, since Morris indicated he was going to burn his automobile. (T. 209). Fair, however, had other plans.

After arriving in Gainesville, Georgia, Thomas, Morris and Sherill Land remained at a Huddle House restaurant, while Fair and Becky Nations left, supposedly to get another car because his was too loud. (T. 207, 210). Fair and Becky drove to a mobile home owned by Bradley Highfield. Fair admitted that he had blood on his shirt upon arriving at Highfield's trailer. (T. 439). Highfield also testified that Fair had blood on him when he arrived at the trailer, and Fair also stated he was in a "little trouble" and needed a ride. (T. 288-290).

Eventually, Fair, Highfield and Nations left Highfield's mobile home. Fair was now driving Highfield's Volkswagon. Nations was in the back seat, and heard part of a conversation

wherein Fair and Highfield discussed that Jackie Morris would have to be killed because Morris had been "a rat in prison." (T. 171). Later, after the shooting of Morris, Sherill Land also heard Fair remark that Morris had been a "ratting S.O.B. on the chain gang." (T. 271-272).

Because Fair and Nations were late returning to the Huddle House, Morris, Thomas and Sherill Land left and headed towards home. (T. 210). Fair, Highfield and Nations soon caught up with the other three on the highway. (T. 210-211). With Fair leading the way in Highfield's Volkswagon, the group traveled over some dirt roads and finally stopped, supposedly, to burn Morris' automobile. (T. 256-257). It was at this location that Fair finally murdered Jackie Morris. (T. 211-215, 257-260, 296, 412-418).

While Morris was working at removing the rear tire of his automobile, in an attempt to make the car look like it had been stripped, Fair pulled his pistol, and shot the kneeling Morris in the head three times. (T. 15, 259). Although Fair contended that the shooting was not planned, and that he and Morris had been arguing, (T. 414); according to witness Sherill Land, who was standing nearby, "They wasn't even fussing." (T. 272). After Fair shot Morris, he laughed and said something about Morris being a rat, and that Morris had pulled a knife on the Petitioner when he was thirteen years old. (T. 215, 272). There was also evidence which tended to show that following the shots, Thomas participated by cutting Morris' throat with a knife. (T. 229, 418, 421). The Petitioner and Thomas then put Morris' body in the automobile, and set it on fire. (T. 213-217, 258-259).

Morris' burned car, and the thirty-nine inches of his charred remains were found the next morning. (T. 47, 57, 58, 126). The next day, "Beetle" Turner and his truck were found at the lake. (T. 73-76). A ballistics expert testified that the bullets taken from Morris, Turner, and from the gas tank of Morris' automobile, were probably all fired from the same weapon. (T. 157-158).

Although Fair contended that the shooting of Morris occurred as the result of an argument, the state's evidence from several witnesses, as previously pointed out, showed that the elimination of Morris was preplanned, because of Morris' alleged propensity to talk. At trial the Petitioner contended that he was sorry for his deed, saying that, "Nobody deserved nothing like that." (T. 424). The state's evidence established that Fair's sorrow was newly acquired.

After Fair's arrest he escaped from the Forsyth County jail. (T. 423-425, 357-358). The state called as witnesses, some of the men who had been Fair's former fellow inmates at the jail. One individual stated that Fair showed him the autopsy report on Jackie Morris. Fair then discussed the killing and told about a man with, "lead in his head," that had been driven into the lake. (T. 329-332). Fair also told that inmate he planned to eliminate the other witnesses. (T. 331-333). Without indicating any remorse, Fair appeared to be trying to impress the other inmates. (T. 336).

Another inmate who had been in Forsyth County jail with Fair, also stated that Fair had commented about there only being thirty-nine inches left of Morris' body. Fair also

told this inmate that he was not sorry, and that he had lost no sleep over it. (T. 339-341).

An individual who had escaped from the jail with Fair stated that Fair had also talked to him about the thirty-nine inch remains of Morris, and told about the killing and the disposal of the bodies of both Morris and Turner. Fair freely admitted killing both men. (T. 357-360). While on escape Fair made a phone call stating that the victims, "deserved it." (T. 361). At the sentencing hearing Fair admitted talking to these people, but denied making many of the statements attributed to him. (T. 434, 437).

After hearing the evidence and deliberating overnight, the trial judge found that the aggravating circumstances were supported by the evidence beyond a reasonable doubt thus justifying the imposition of the death penalty. The judge found that the murder of Jackie Morris was committed while the Petitioner was engaged in the commission of another capital felony, to wit: the murder of "Beetle" Turner. [Ga. Code Ann. § 27-2534.1(b)(2)]. The judge also found that the murder of Jackie Morris had been outrageously and wantonly vile, horrible and inhuman in that it involved depravity of mind on the part of the Petitioner. [Ga. Code Ann. § 27-2534.1(b)(7)]. (T. 492; R. 98).

Immediately following the court's oral announcement of the sentence, Petitioner's defense counsel attempted to withdraw the Petitioner's plea of guilty. (T. 484). After extensive argument, the trial judge eventually denied the request for withdrawal. (T. 491).

It should also be noted at this point, that approximately three months after Petitioner's conviction and sentence in Hall County for the murder of Jackie Morris, he was actually tried in the Superior Court of Habersham County for the murder of "Beetle" Turner, and was subsequently acquitted. The Habersham County transcript has not been made a part of the record in this case. It is clear that the Habersham case was tried before a different trier of fact, with a different prosecutor, and with a different defense attorney. It cannot be assumed that all of the evidence was the same at both proceedings.

Additional facts may be related in the following portion of this brief to more fully explain Respondent's arguments against issuance of the writ.

PART THREE

REASONS FOR NOT GRANTING THE WRIT

I. PETITIONER'S PLEA OF GUILTY WAS FREELY, VOLUNTARILY AND INTELLIGENTLY ENTERED.

There appears to be no contradiction of facts pertaining to the circumstances surrounding the entry of Mr. Fair's plea of guilty in the Superior Court of Hall County, Georgia. In the Butts County, Georgia habeas corpus proceeding, Petitioner Fair raised the issue challenging the voluntary and intelligent nature of his plea, basing his argument upon evidence which showed that both of Petitioner's trial counsel, George Brinson and Michael Casper, had advised the Petitioner that even if a death sentence were imposed by the trial judge following the guilty plea, the Petitioner could still withdraw his plea and opt for a jury trial. As is reflected in the opinion of the Georgia Supreme Court in Fair v. State, supra, 245 Ga. at p. 875-876, this advice was based on an erroneous misinterpretation of Ga. Code Ann. § 27-1404. That Code Section provides in relevant part as follows:

> . . . If [a defendant] shall plead 'guilty,' such plea shall be immediately recorded on the minutes of the court by the clerk, together with the arraignment; and the court shall pronounce upon such prisoner the judgment of the law, in the same manner as if he had been convicted of the offense by the verdict of a jury; but, at any time before judgment is pronounced, the

> prisoner may withdraw the plea of 'guilty,' and plead 'not guilty,' and such former plea shall not be given in evidence against him on his trial.

The state habeas court had before it the testimony of both of Petitioner's trial attorneys, the testimony of the Petitioner and of course the record of Petitioner's plea hearing in the Superior Court of Hall County.

The record of the plea hearing, and the testimony of Petitioner and his attorneys demonstrated that his attorneys had thoroughly investigated the case, and had spent over 100 hours interviewing the Petitioner, various witnesses, the prosecuting attorneys and engaging in legal research. (HT. 19, 21, 23). Defense counsel's investigation, review of the prosecution file, and discussions with the district attorney led them to conclude that the state had an air-tight case against the Petitioner, and that his chances of acquittal were minimal. (HT. 19, 57, 63-64, 65). Defense counsel had also been advised that the state was seeking the death penalty in Petitioner's case. (R. 32).

In light of the overwhelming evidence against the Petitioner, defense counsel devised a plan which they surmised would provide him with the best opportunity for receiving a life sentence rather than a death penalty. After advising Fair of the evidence which the state was prepared to offer, defense counsel also advised him that if he plead guilty he stood a better chance of receiving a life sentence, and even if the trial judge imposed a death penalty, defense counsel could withdraw the guilty plea and later proceed to a jury trial. (HT. 10-12, 19, 53, 55).

At the plea hearing, Petitioner informed the trial judge that his attorneys had previously gone over a detailed guilty plea petition with him which covered numerous, specific questions to insure the voluntary and intelligent nature of the plea. (T. 6-7; R. 90-91). (See Appendix A to this Brief in Opposition). At the state habeas hearing in the Superior Court of Butts County and at the guilty plea hearing in Hall County, Georgia, Petitioner admitted his attorneys had gone over the guilty plea form with him, and that he understood it and had signed it. (T. 6; HT. 22, 59, 65). At the plea hearing itself, Petitioner stated that he understood the charges against him, and had fully discussed the case of with his attorneys. (T. 7-8). The trial judge, on the record, advised Petitioner of his right to plead not guilty and remain silent, his right to a public trial by jury, and his right to confront and call witnesses. (T. 8-9). The trial judge also explained that the Petitioner had the option of not testifying at trial and placing the burden upon the state to prove its case. (T. 9). Pertaining to Petitioner's sentence, the trial judge advised him that he could impose the same sentence as if the Petitioner was tried by a jury, and specifically informed Petitioner that he could be sentenced to death. (T. 10). The Petitioner affirmed on the record that there had been no threats or promises made to induce his plea, and further stated that no one, including his attorneys, had suggested or represented to him that he would not receive the death penalty because he pled guilty. The trial judge advised him that he was not opposed to capital punishment. (T. 10-11, 14).

The Petitioner admitted on the record that he had killed Jackie Morris by shooting him three times in the head, and he further described the details of the shooting. (T. 11, 15-16). Based on all of the aforesaid, the trial court accepted the Petitioner's plea of guilty. (T. 19). (See, Appendix B to this Brief in Opposition).

It is axiomatic that a guilty plea is invalid unless it is intelligently and voluntarily entered by defendant. Boykin v. Alabama, 395 U.S. 238, 242 (1969). However, a plea is not rendered invalid, because it represents a compromise by the defendant, thrusts a difficult judgment upon him, or is motivated by fear of greater punishment. Brady v. United States, 397 U.S. 742 (1970); United States v. Sepe, 474 F.2d 784 (5th Cir. 1973), aff'd en banc, 486 F.2d 1084 (5th Cir. 1974). The relevant constitutional standard is, "whether the plea represents a voluntary and intelligent choice among the alternative courses open to the defendant." North Carolina v. Alford, 400 U.S. 25, 37 (1970); Parker v. North Carolina, 397 U.S. 790, 795-796 (1970).

This court has previously recognized that a plea is not necessarily unintelligently or involuntarily entered simply because the advice of defense counsel may be proven wrong in retrospect. In McMann v. Richardson, 397 U.S. 759 (1970), the court refused to affirm the granting of habeas corpus relief to petitioners who had argued that their pleas of guilty had been induced by allegedly coerced confessions, and as a result of the advice from their attorneys that the confessions would have been admissible at the trial. Recognizing that waiving trial entails the inherent risk that the good

faith evaluations of reasonably competent counsel, may be mistaken either as to the facts or as to what the court's judgment will be on given facts, this Court held that absent attorney advice which fell below that range of competence generally demanded of attorneys in criminal cases, habeas corpus relief would not be granted. Id. at p. 770-771. Whether a guilty plea is intelligent does not require that all attorney advice be able to withstand retrospective scrutiny. Id. at p. 770. Likewise, in Brady v. United States, 397 U.S. 742 (1970), this Court held that a guilty plea had been intelligently entered notwithstanding defense counsel's advice which proved, nine years later, to be erroneous. In that case, defense counsel had advised the defendant that if he went to trial there was a possibility of receiving a death penalty, while under a plea of guilty he could only receive a life sentence. United States v. Jackson, 390 U.S. 570 (1968) which was decided nine years after the defendant in Brady had pled guilty, prohibited the imposition of the death penalty under such circumstances. This Court in Brady focused upon the truth and reliability of the defendant's plea which was not impugned by what ultimately was determined to be erroneous advice from defense counsel.

The Petitioner in the instant case, similar to the Petitioner in Brady, was aware of precisely what he was doing when he admitted in court that he had killed Jackie Morris by shooting him three times in the head. Also, as in Brady, Petitioner Fair was motivated by the strength of the prosecution's case, and the likelihood that he would receive the death penalty

following a jury trial. (HT. 60). Faced with this strong possibility, the Petitioner knowingly and intelligently opted to place his faith in the hands of the trial judge. As this court has noted:

> Considerations like these frequently present imponderable questions for which there are no certain answers; judgments may be made that in the light of later events seem improvident, although they were perfectly sensible at the time. The rule that a plea must be intelligently made to be valid does not require that a plea be vunerable to later attack if the defendant did not correctly assess every relevant factor entering into his decision. A defendant is not entitled to withdraw his plea merely because he discovers long after the plea has been accepted that his calculus misapprehended the quality of the State's case or the likely penalties attached to alternative courses of action. More particularly, absent misrepresentation or other impermissible conduct by state agents, cf. Von Moltke v. Gillies, 332 U.S. 708, 68 S.Ct. 316, 92 L.Ed. 309 (1948), a voluntary plea of guilty intelligently made in light of the then applicable law does not become vunerable because later judicial decisions indicate that the plea rested on a faulty premise. Brady v. United States, supra at p. 756-757.

In the instant case, defense counsel's advice to the Petitioner that he would be permitted to withdraw his plea, was premised upon what defense counsel had construed to be the existing law in Georgia. In its opinion on direct appeal in Fair v. State, supra the Georgia Supreme Court, in actually a case of first impression, ultimately held that defense counsel's interpretation of the relied upon, aforesaid Georgia Code provision was erroneous. Defense counsel's advice to the Petitioner in no way affected the reliability of the plea which ultimately was supported by overwhelming evidence that was introduced by the state during the sentencing phase of the proceeding. Petitioner pled guilty knowing full well that he could receive the death sentence for his action. In court he was advised that by pleading guilty he would be waiving his right to a jury trial. When all of the aforesaid is considered, Respondent respectfully submits that there is no merit to Petitioner's assertions that his plea was not freely, voluntarily or intelligently entered.

II. THE SUPERIOR COURT OF HALL COUNTY AND THE GEORGIA SUPREME COURT ON DIRECT APPEAL PROPERLY RULED THAT THE PETITIONER HAD NO RIGHT TO WITHDRAW HIS GUILTY PLEA AFTER ORAL SENTENCE HAD BEEN PRONOUNCED, AND SAID RULINGS DID NOT VIOLATE PETITIONER'S DUE PROCESS RIGHTS.

Petitioner's second argument urging issuance of the writ in the instant case, contends that the Georgia Supreme Court's interpretation of Ga. Code Ann. § 27-1404 as applied

to Petitioner's case has violated Petitioner's due process rights under the Fifth and Fourteenth Amendments to the United States Constitution. This same argument was previously made by the Petitioner in his initial petition for a writ of certiorari following the affirmance of his conviction on direct appeal to the Georgia Supreme Court. See Fair v. Georgia, United States Supreme Court Case No. 79-6884. As has previously been noted, this Court denied certiorari on this first petition. Fair v. Georgia, 449 U.S. 986 (1981), rehng. den., 449 U.S. 1104 (1981). Petitioner has expounded no new arguments which would now justify the granting of his petition on this issue.

As has been noted in the previous statement of facts, the Petitioner attempted to withdraw his plea of guilty following the trial court's oral announcement of the death sentence. The withdrawal was made prior to the trial court's signing the sentence and filing it with the Clerk of the Court. This attempted withdrawal was based upon Ga. Code Ann. § 27-1404, supra.

In its opinion in this case, the Georgia Supreme Court cited its prior holding in Smith v. State, 231 Ga. 23, 200 S.E.2d 119 (1973), which recognized that, "[t]he purpose of the withdrawal provision of Code Ann. § 27-1404 is to provide a necessary part of the plea bargaining procedure . . ." Fair v. State, supra at p. 877. The court properly rationalized that when a guilty plea is entered in a capital case, and it is clear that the state is seeking the death penalty, the withdrawal provisions of Ga. Code Ann. § 27-1404 have no rational purpose, and in effect would operate to completely frustrate Ga. Code Ann. § 27-2528, which specifically authorizes a trial judge

to impose the death sentence upon a plea of guilty. [See, Ga. Laws 1973, p. 159, 162).

Although Petitioner argues that he had an established right to withdraw his plea under Ga. Code Ann. § 27-1404 prior to the trial judge's signing and filing his sentence, it is clear that Petitioner is relying upon opinions from the Georgia Court of Appeals, which did not deal with capital crimes, and which did not deal with the conflict between Ga. Code Ann. § 27-1404 and Ga. Laws 1973, p. 159, et seq., which provided a new, comprehensive procedure in capital felony cases. The Georgia Court of Appeals had never interpreted Code § 27-1404 in a death penalty case, because all such appeals are directed to the Georgia Supreme Court. Ga. Const., Art. VI, Sec. II, Para IV; Ga. Code Ann. § 2-3104. Not only had the Georgia Supreme Court never before interpreted the withdrawal provisions of Ga. Code Ann. § 27-1404 in light of Georgia statutory procedure for the imposition of the death penalty, the Georgia Supreme Court also had never specifically addressed itself to the interpretation of the term, "pronouncement," as used in the aforesaid Code Section. Thus, as the Georgia Supreme Court noted in its opinion, the question before it was clearly one of first impression. In Petitioner's direct appeal, the Georgia Supreme Court also stated that nothing in its opinion ". . . should be construed as approval by the court of the Court of Appeals' interpretation of Code Ann. § 27-1404 as permitting withdrawal of a guilty plea after sentence is already pronounced." Fair v. State, supra, at p. 878, fn. 5.

In fact, contrary to Petitioner's assertion in his brief, a non-capital defendant does not have more rights than a capital

defendant in regards to his right to withdraw a guilty plea. In State v. Germany, 246 Ga. 455, 271 S.E.2d 851 (1980) the Georgia Supreme Court specifically held that the term pronouncement as utilized in Ga. Code Ann. § 27-1404 means oral pronouncement, and that a defendant does not have an absolute, statutory right under said Code Section to withdraw his guilty plea after said oral pronouncement.

Respondent again stresses that in the instant case, the Petitioner was thoroughly questioned by the trial court prior to the acceptance of the guilty plea, and the judge informed the Petitioner that he was not conscientiously opposed to capital punishment, and that if the circumstances and evidence warranted, the death penalty might be imposed. Knowing this, the Petitioner still chose to plead guilty, and in his own words admitted shooting Jackie Morris in the head three times. A two day, extensive sentencing hearing followed and the Petitioner made no attempt to withdraw his plea even after hearing the volumnious amount of evidence which the state had amassed against him. No attempt was made to withdraw the plea until the planned action was taken by counsel immediately after the judge orally announced his sentence in open court.

This Court has recognized that judicial decisions may operate in a ex post facto fashion so as to deprive a criminal defendant of his due process rights. See Bouie v. Columbia, 378 U.S. 347 (1964). However, in both Bouie and in Bunkerhoff-Faris Trust & Savings Company v. Hill, 281 U.S. 673 (1930), cited by the Petitioner, the judicial decisions of the state supreme courts had been clearly contra to said state supreme courts' prior decisions on the same issues. See, Bouie v. Columbia, supra at p. 356, Bunkerhoff-Faris Trust & Savings Company v. Hill, supra at p. 676.

In the present case the Georgia Supreme Court had never before addressed the precise issue which was before it, and as noted earlier, neither the Georgia Supreme Court nor the Georgia Court of Appeals had ever interpreted Ga. Code Ann. § 27-1404 in light of Georgia's new statutory procedure for the imposition of the death penalty. Neither had the Georgia Supreme Court ever interpreted the statutory terminology of Code § 27-1404. Since the issues were questions of statutory and procedural questions never before addressed by the highest court in the State of Georgia, the Georgia Supreme Court's decision did not deprive the Petitioner of an established, procedural right or due process of law.

In conclusion, for all of the aforesaid reasons, this Court should decline to grant the writ of certiorari to review the issue raised in Petitioner's second argument.

III. THE GEORGIA SUPREME COURT PROPERLY PERFORMED ITS REQUIRED DUTY TO REVIEW ALL DEATH PENALTIES IMPOSED UNDER THE GEORGIA CAPITAL PUNISHMENT STATUTORY PROCEDURES, AND PROPERLY AFFIRMED THE TRIAL JUDGE'S FINDING IN THE INSTANT CASE THAT THE EVIDENCE SHOWED SUFFICIENT STATUTORY AGGRAVATING CIRCUMSTANCES UNDER GA. CODE ANN. § 27-2534.1(b)(2) AND (b)(7) TO WARRANT THE IMPOSITION OF THE DEATH SENTENCE.

As is the case with Petitioner's previous argument, his third argument (and his third and fourth issues presented), were raised in Petitioner's initial petition for a writ of certiorari which was denied. Fair v. Georgia, supra. Also, as with his previous argument, Petitioner's assertions challenging his death sentence under Ga. Code Ann. § 27-2534.1(b)(2) and (b)(7), as set out in the instant petition are insufficient to justify this Court's reaching a decision on the issuance of the writ which is different from this Court's initial determination which denied same.

The first portion of Petitioner's argument challenges the imposition of his death sentence under Georgia's (b)(2) aggravating circumstance. His reference to Godfrey v. Georgia, 446 U.S. 420 (1980) pertaining to this issue is clearly unmeritorious since in Godfrey the only aggravating circumstance dealt with was Ga. Code Ann. § 27-2534.1(b)(7). The (b)(2) aggravating circumstance was not found by the jury in that case and was not discussed

either by the Georgia Supreme Court or in this Court's opinion.

Petitioner's attack upon the trial judge's finding of the (b)(2) aggravating circumstance is twofold. First, he asserts that his crime does not fit within the restrictions of the statute which requires the murder to occur while the offender was engaged in the commission of another capital felony.[2/] As is evident from the aforesaid statement of facts, there was an overwhelming amount of evidence presented to the trial judge in the instant case, which amply proved beyond any scintilla of doubt that the murder of Jackie Morris had been perpetrated by the Petitioner to cover his prior murder of Beetle Turner. This was specifically found by the Georgia Supreme Court on its direct appeal of Petitioner's conviction. Fair v. State, supra at p. 871. Petitioner notes in his brief at page 17 that in his concurring opinion in Gregg v. Georgia, 428 U.S. 153 (1976), Justice White recognized that the purpose behind the (b)(2) aggravating circumstance is to allow the state to seek the death penalty in "witness-elimination" murders. Id. at p. 221, fn. 10. Petitioner also contends that the import of Justice White's remark in Gregg is that a necessary condition for a fulfillment of the conditions of the (b)(2) aggravating circumstance is that the defendant has killed someone to avoid being identified as the perpetrator of another crime. Petitioner's Brief at p. 17. That is exactly what happened in this case. As may be ascertained from the aforesaid statement of facts, the Petitioner killed Jackie Morris because Morris had witnessed the Petitioner's

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2/ Under Ga. Code Ann. § 27-2534.1(b)(2) the death penalty may be imposed upon a finding that, "The offense of murder . . . was committed while the offender was engaged in the commission of another capital felony, or aggravated battery, or the offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree."

execution of Beetle Turner,and because Petitioner was afraid that Morris would eventually talk. The facts of this case specifically fall within the circumstances which the Georgia General Assembly intended to cover when it enacted the (b)(2) aggravating circumstance. In affirming the (b)(2) aggravating circumstance in the instant case, the Georgia Supreme Court has correctly applied the basic premise that the objective of a court in construing statutory construction is to ascertain the intent of the legislature and to give that intent to that legislative will. Philbrook v. Glodgett, 421 U.S. 707, 713 (1975).

Petitioner also argues that the (b)(2) aggravating circumstance was erroneously applied in this case, because Petitioner was eventually acquitted in Habersham County, Georgia for the murder of Turner. The law is clear in Georgia that Ga. Code Ann. § 27-2534.1(b)(2) does not require a conviction before the trier of fact may find the supporting additional capital felony as an aggravating circumstance authorizing the death penalty. Fair v. State, supra at p. 870; Collier v. State, 244 Ga. 553, 261 S.E.2d 364 (1979), cert. den., 445 U.S. 946 (1980); Hooks v. State, 233 Ga. 149, 210 S.E.2d 668 (1974), sentence vacated on other grounds, 433 U.S. 917 (1977).

This Court has recognized that during sentence determination in a capital felony case, the trier of fact should consider a broad spectrum of circumstances including such things as the character of the accused, his past record and all of the circumstances surrounding the particular offense. Lockett v. Ohio, 438 U.S. 586 (1978); Woodson v. North Carolina, 428 U.S. 280, 284 (1976).

In the instant case, Fair was charged with two separate murders in two separate counties, and was tried before two distinct judicial bodies. The trial judge in Hall County in finding beyond a reasonable doubt that the Petitioner had committed the murder of Beetle Turner, had the opportunity to consider evidence which may not have necessarily been admissible during the guilt/innocence phase of Petitioner's trial before a jury in Habersham County. The record in the courts below do not reflect what evidence was presented to the Habersham County jury which subsequently acquitted Petitioner of the Beetle Turner murder. Additionally, Petitioner's acquittal in Habersham County only demonstrates that the prosecutor in that case failed to prove beyond a reasonable doubt that Fair had murdered Turner. It does not necessarily follow that such a deficiency in proof existed in Hall County, and indeed, a review of the record below shows an overwhelming amount of evidence supporting Petitioner's guilt in both murders. In its addendum opinion, the Georgia Supreme Court referred to the recent decision of this Court in Standefer v. United States, ___U.S.___, 100 S.Ct. 1999 (1980), and the following language which is relevant to this case:

> This case does no more than manifest the simple, if discomforting, reality that 'different juries [may] reach different results under any criminal statute. That is one of the consequences of our jury system.' Roth v. United States, 354 U.S. 476, 492 (1957). While symmetry of results may be intellectually satisfying,

it is not required. Standefer v. United States, 100 S.Ct. at p. 2008-2009.

Here, Petitioner argues that the death penalty under (b)(2) aggravating circumstance may not stand in light of Petitioner's acquittal for the murder of Beetle Turner, because of the necessity for greater reliability required in death penalty cases. Respondent submits that the reliability of the trial judge's finding in this case is beyond question, as is evidenced by the facts set out previously. Petitioner is asking this Court to speculate as to why he was acquitted in Habersham County, when in fact the evidence in Hall County supporting the aggravating circumstance was overwhelming. This Court should refuse to engage in such speculation, and should deny Petitioner's request to review his death penalty under the (b)(2) aggravating circumstance.

Petitioner also contends that his death penalty under the (b)(7) aggravating circumstance has been unconstitutionally imposed and affirmed by the Georgia Supreme Court, because of the trial court's lack of a finding of aggravated battery or torture to the victim. As has previously been noted, there were two statutory aggravating circumstances found to exist by the trial judge. The (b)(7) aggravating circumstance was that the murder of Jackie Morris had been vile, horrible or inhuman in that it involved depravity of mind on the part of the Petitioner. (R. 98).

As this Court is well aware, Georgia's seventh aggravating circumstance authorizes the jury, or the trial judge when the case is tried without a jury, to impose the death penalty when

it finds beyond a reasonable doubt that: "The offense of murder . . . was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim." Ga. Code Ann. § 27-2534.1 (b)(7). This Court has noted the Georgia Supreme Court's recognition of its obligation under the Georgia statutory provisions which mandate that it thoroughly review death sentences,[3/] and specifically with regard to Ga. Code Ann. § 27-2534.1(b)(7), the Georgia Supreme Court has stated that it has no intention of permitting that Code Section to become a "catchall" for cases simply because no other statutory aggravating circumstance has been raised by the evidence. Harris v. State, 237 Ga. 718, 730, 230 S.E.2d 1 (1976), cert. den., 431 U.S. 933 (1977), rehng. den., 434 U.S. 822 (1977). The Georgia Supreme Court further stated in Harris, its intention to restrict its approval of death sentences supported by Code Section 27-2534.1(b)(7) to those cases which lie not on the periphery of the statutory boundary, but to only approve those sentences which are so outrageous and vile so as to lie at the core of the statutory intent. As the previous statement of facts amply demonstrate, the circumstances surrounding the murder of Jackie Morris fall well within the purview of the (b)(7) aggravating circumstance,

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3/ Under Ga. Code Ann. § 27-2537(c), the Georgia Supreme Court must review all death penalty cases to determine:

> Whether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor, and (2) Whether in cases other than treason or aircraft highjacking, the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in Section 27-2534.1(b) and (3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

in that they demonstrate beyond any doubt the wanton, vile and inhuman nature of the murder and the depravity of mind of the Petitioner.

In reviewing this case, the Georgia Supreme Court specifically interpreted the (b)(7) aggravating circumstance in light of the Petitioner's arguments on appeal that the death penalty could not be supported without a finding of torture or aggravated battery. The Georgia Supreme Court explicitly stated that the disjunctive phraseology of the statute requires only that at least one phrase of the first portion of the statute exists due to a finding of at least one phrase of the second clause of the statute. Fair v. State, supra at p. 872. Contrary to Petitioner's contentions, this was not a novel interpretation of the (b)(7) aggravating circumstance. The Georgia Supreme Court also noted that it had upheld an identical finding of this statutory aggravating circumstance in Corn v. State, 240 Ga. 130, 140-141, 240 S.E.2d 694 (1977). It is axiomatic that this Court will not construe a state statute contrary to the construction given it by the highest court of said state. O'Brien v. Skinner, 414 U.S. 531 (1974); Memorial Hospital v. Maricopa County, 415 U.S. 250, 256 (1974).

Also contrary to the position of the Petitioner, this Court's decision in Godfrey v. Georgia, 446 U.S. 420 (1980) does not require a finding of torture or aggravated battery before the death penalty may be imposed. In fact, the plurality opinion specifically reviewed the evidence to determine whether Godfrey's death sentence could have been supported by a finding that the murders in that case had been outrageously or wantonly vile, horrible or inhuman in that they involved simply depravity of

mind. This Court found that the defendant in Godfrey could not have been said to have reflected a consciousness materially more "depraved" than that of any person guilty of murder. The victims in Godfrey were killed instantly, they were members of the defendant's family who had caused him extreme emotional trauma, and shortly after the killings, the defendant acknowledged his responsibility for the heinous nature of the crime.

In its addendum opinion in Fair v. State, supra at p. 879-881, the Georgia Supreme Court specifically reviewed Petitioner's death sentence in light of Godfrey. The Georgia Court noted, and it is also apparent from the aforesaid statement of facts, that there are numerous distinguishing factors between Godfrey and the instant case. The victim in this case, Jackie Morris, was killed by the Petitioner as a result of the Petitioner's planned, cold-blooded attempt to eliminate Morris as a witness, and to cover up his previous murder of Beetle Turner. Aside from shooting Morris in the head at point-blank range, there was evidence showing that Petitioner's accomplice had cut the victim's throat. The victim's body was burned and mutilated after the killing. The court specifically noted that, "aside from laughing during the killing itself, the Petitioner showed no remorse thereafter but instead bragged about the killing and said he would kill the other witnesses when he got out of jail." Id. at p. 880. In Godfrey, the jury in its written findings, stated as the only aggravating circumstance supporting the death penalty, that the offense of murder was outrageously or wantonly vile, horrible or inhuman. The plurality opinion in Godfrey found that there was nothing in these few words standing alone, that implied any inherent restraint on the arbitrary and capricious infliction of the death sentence. In the instant case, however, the trial judge found the additional factor that

the murder involved depravity of mind. As the Georgia Supreme Court had implicitly recognized in Corn, supra, and as it has explicitly recognized in Fair v. State, supra and in Hance v. State, 245 Ga. 856, 861-863, 268 S.E.2d 339 (1980), cert. den., 449 U.S. 1067 (1980), rehng. den., 449 U.S. 1135 (1981), the phraseology of the (b)(7) aggravating circumstance must be considered in the disjunctive.

Petitioner's arguments, that previous decisions of the Georgia Supreme Court in Blake v. State, 239 Ga. 292, 236 S.E.2d 637 (1977) and in Harris v. State, 237 Ga. 718, 230 S.E.2d 1 (1976) have held that torture or aggravated battery must be found in addition to depravity of mind, misinterpret those cases. In the Blake opinion, the Georgia Supreme Court was simply enunciating that a jury finding under the entire (b)(7) aggravating circumstance left no room for a nonunanimous verdict, since any defendant who had engaged in the torture or aggravated battery of his victim also retained the depravity of mind contemplated by the statute. The court was not holding that in all cases to support a finding of depravity of mind, torture or aggravated battery must also be found. This is made explicitly clear in Fair v. State, supra and in Hance v. State, supra. Likewise, a careful reading of Harris v. State, supra, reveals no language which would require a finding of depravity of mind in all cases to be supported by torture or aggravated battery.

In conclusion, since there was ample evidence to support the trial judge's findings of aggravating circumstances under both Ga. Code Ann. § 27-2534.1(b)(2) and (b)(7) which sufficiently demonstrate that the trial judge's discretion in imposing the death sentence was controlled by clear and objective standards

so as to produce a nondiscriminatory and nondisproportionate application of the death penalty, this Court should not grant the writ of certiorari to review the issues raised under Petitioner's third argument.

IV. THE STATE DID NOT WITHHOLD FROM THE PETITIONER ANY MATERIAL, EXCULPATORY EVIDENCE RELATING TO UNDISCLOSED PROMISES OF LENIENCY WHICH HAD BEEN MADE TO ANY OF THE STATE'S WITNESSES.

Under the Petitioner's final argument, he contends that the state prosecutors allegedly suppressed favorable, material, and impeaching evidence concerning alleged promises of leniency which had been made to witness Michael Marable.

Witness Marable was called to testify as a state witness during the sentencing phase of the Petitioner's trial. He testified that he had been incarcerated in the Forsyth County, Georgia jail after he had been arrested for an escape from the Cobb County, Georgia jail where he was being held on A.W.O.L. charges. (T. 355-356). While incarcerated in the Forsyth County Jail Marable met Petitioner Fair and they subsequently escaped together. (T. 356). During the period of time that the Petitioner and Marable were out on escape, Fair made several incriminating admissions to Marable. He described how he had committed two murders, shooting both victims with their own guns. (T. 358-359). Fair admitted to Marable that the bodies of one of the victims had been driven into the lake in the back of a pickup truck and that the other victim had been burned, leaving only a thirty-nine inch torso. (T. 350-360). Marable further related that while he was with

Fair, Fair had engaged in a telephone conversation wherein he admitted that the victims deserved to die (T. 361). Fair also admitted to Marable that one of his accomplices had cut one of the victims' throats. (T. 367).

During the cross-examination of Marable, defense counsel asked whether he had been promised anything in return for his testimony. Marable answered that he had not, but he also admitted to defense counsel that he had admitted making the statement that he would be glad to testify against the Petitioner if it would help him out. (T. 366). Marable stated that he had not received anything in exchange for his testimony. (T. 366-367). On redirect examination by the state prosecutor, Marable stated that he was told that the Hall County prosecutor had nothing to do with the Forsyth County charges. (T. 367). Marable also stated that he had received five years to serve and five years on probation as a result of the Forsyth County charges, and that the maximum sentence which he could have received was forty-six years. (T. 369-370).

At the state habeas corpus hearing Petitioner called Michael Marable in support of his state petition. At that hearing, Marable related that he had spoken to the Hall County District Attorney, who had informed him that he would write a recommendation for Marable, but could not promise him anything. (HT. 43, 50, 51).

Former Assistant District Attorney Roland Stroberg also testified at the state habeas corpus hearing by way of deposition. Mr. Stroberg admitted that he spoke to witness

Marable prior to the Petitioner's trial, while Marable was incarcerated in the Forsyth County Jail. (DT. 4).[4/] Except for a brief occasion when Stroberg observed Marable and his mother at court, this was the only occasion that Stroberg had interviewed Marable. (DT. 5, 7). The Assistant District Attorney's conversation with Marable was tape recorded and transcribed and was provided to Mr. Fair's defense counsel prior to trial. (DT. 5, 8; T. 43). Stroberg stated emphatically that he had made no promises of leniency, nor did he have any knowledge that anyone else had made any such promises, other than those which were reflected in the transcribed interview which was served upon defense counsel. (T. 7, 8, 9). A review of that transcribed interview shows that indeed, Mr. Stroberg only told Marable that he could make no promises as to any pending charges in Forsyth or Cobb Counties, but that Marable's cooperation would be made known. Specifially, Stroberg told Marable:

> Now getting back to where we were talking about, getting back to you testifying, like I said, I ain't going, I'm not going to tell you, I never have told anybody that I can do anything for them cause I cain't, (sic) but all I'll tell you is that if you do get up there and testify, that we know it takes some guts and we will make it know (sic) to anybody that deals with any case that you have, that you didn't have

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4/ References to the pagination of the deposition of Roland Stroberg which was taken on July 29, 1981 shall be referred to as (DT._____).

> testify about this, I mean you know, I can have the judge order you to testify, whatever good that does. I know you don't have to testify and I know you're telling the truth cause there ain't no other way you could know about it, but if you testify and I know you're telling the truth cause there ain't no other way you could know about it, but if you testify we'll make it known to whoever is dealing with your cases and that's all I can do. (Interview Transcript, p. 27).

Stroberg also had told Marable that if he testified, that he would do anything he could to see that Marable was protected. (Id. at p. 28). As has previously been noted, this complete transcript was given to defense counsel prior to trial, and they had full knowledge as to the conversation between Stroberg and Marble. Strobe[illegible] also testified by way of his deposition that he made no representations and heard no intimations or inferences from anyone else that Marable's girlfriend would not be prosecuted. (DT. 16). At the time of Fair's trial, Stroberg had no idea as to the sentence which Marable received in Forsyth County, and was aware of no specific conditions that had been attached to that sentence. (T. 18). In fact, Stroberg did not contact the Forsyth County authorities, but was under the impression that the law enforcement officers in that county had made Marable's cooperation known to the Forsyth County Judge. (DT. 20).

Based on the aforesaid evidence which was presented the state habeas court simply concluded that there were no undisclosed promises or leniency which had been made to witness Marable. (See Petitioner's Appendix, p. 9).

Since there was no material, impeaching evidence withheld, Giglio v. United States, 405 U.S. 510 (1972), and Brady v. Maryland, 373 U.S. 83 (1963) were not violated.

For all of the aforesaid reasons, this Court should refuse to grant certiorari to review Petitioner's final argument.

CONCLUSION

For all of the aforesaid reasons this Court should refuse to grant the writ of certiorari because no sufficient reasons have been set forth by Petitioner to justify issuance of the writ.

Respectfully submitted,

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A P P E X D I X A

(Excerpts from the Official Record in the Superior Court of Hall County, Georgia).

IN THE SUPERIOR COURT
FOR THE COUNTY OF HALL
STATE OF GEORGIA

STATE OF GEORGIA, Plaintiff

VS

KEITH FAIR, Defendant

CASE NO. 45668

PETITION TO ENTER PLEA OF GUILTY

I, the above named defendant, hereby state to the Court that I wish to enter a plea of GUILTY to the above numbered indictment.

In connection with that plea of GUILTY, I inform the Court that the answers to the following questions are true:

1. What is your name? KEITH FAIR
2. What is your age? 28
3. How much education have you had? 7th grade

4. Are you able to read and write?	Yes ✓	No
5. Are you now under the influence of any alcohol, intoxicants or any drugs?	Yes	No ✓
6. To your knowledge, do you now suffer from any mental or emotional disability?	Yes	No ✓
7. Have you received a copy of the indictment in this case?	Yes ✓	No
8. Have you read it or had it read and explained to you?	Yes ✓	No
9. Do you fully understand the charges against you?	Yes ✓	No
10. Have you had enough time to talk with your lawyer about your case?	Yes ✓	No
11. Have you discussed your case fully and explained everything you know about it to your lawyer including all of the facts and circumstances surrounding any statement, confession or other evidence obtained from you by anyone?	Yes ✓	No
12. Has your lawyer advised you of the nature of the charges against you and any possible defenses you may have including the right to challenge the legality of any statement, confession or other evidence obtained or seized from you?	Yes ✓	No
13. Do you understand that you have a right to plead NOT GUILTY to every charge filed against you?	Yes ✓	No
14. Do you understand that if you plead NOT GUILTY you have a right to a speedy and public trial by a judge and jury?	Yes ✓	No
15. Do you understand that if you plead NOT GUILTY you have a right to confront, that is to see, hear, question and cross-examine the witnesses called to testify against you at trial?	Yes ✓	No
16. Do you understand that if you plead NOT GUILTY you have a right to use the subpoena power of the Court to require the attendance of any witnesses on your behalf, whether they want to come or not?	Yes ✓	No
17. Do you understand that if you plead NOT GUILTY you have the right to testify or not testify, as you choose, that you cannot be required to testify and that if you do not testify the jury cannot take that as evidence against you?	Yes ✓	No
18. Do you understand that if you plead NOT GUILTY you will be presumed to be innocent and that before you can be convicted the prosecution will have the duty of proving your guilt beyond a reasonable doubt?	Yes ✓	No
19. Do you understand that, in the event you were convicted in a trial, you would have the right to appeal your conviction?	Yes ✓	No
20. Do you understand that if you plead GUILTY you will have waived, that is, given up, each of the rights mentioned in questions 13 through 19?	Yes ✓	No
21. Do you realize that if you plead GUILTY the Court may impose the same punishment as if you had pleaded NOT GUILTY and been convicted?	Yes ✓	No
22. Do you know that the sentence you will receive is solely a matter for the judge to decide?	Yes ✓	No
23. Have you been advised of the maximum punishment provided by law for the offense or offenses to which you want to plead GUILTY?	Yes ✓	No

What is it? DEATH BY ELECTROCUTION

24. Do you realize that if you plead GUILTY the Court may sentence you to the maximum punishment authorized by law for the offense or offenses to which you plead GUILTY?	Yes ✓	No
25. If you are now on probation or parole, do you know that by pleading GUILTY here your probation or parole may be revoked and that you may be required to serve time in that case in addition to the sentence imposed upon you in this case?	Yes ✓	No
26. If you are now serving another sentence, do you know that the sentence in this case could be made to follow the sentence you are now serving?	Yes ✓	No
27. Has any person used any threats, force, pressure or intimidation to make you plead GUILTY?	Yes	No ✓
28. Has any promise been made by anyone which causes you to plead GUILTY?	Yes	No ✓
29. Has any person suggested to you or led you to believe that you will be placed on probation or be given a lighter sentence or otherwise rewarded for pleading GUILTY?	Yes	No ✓

If so, who made the suggestion and exactly what was suggested? N/A

30. Has any plea agreement been made by you with anyone which causes you to plead GUILTY?	Yes	No ✓

If so, exactly what is that agreement, as you understand it? N/A

31. Is your plea of GUILTY given voluntarily and of your free will and accord? Yes ✓ No ____.

32. Did you commit the unlawful acts set forth in the charge or charges to which you want to plead GUILTY? Yes ✓ No ____.

Specifically what unlawful acts did you commit? I SHOT JACKIE MORRIS

33. Has your lawyer gone over all these questions and your answers to them with you? Yes ✓ No ____.

34. Are you satisfied with your lawyer and the way he has represented you in the case? Yes ✓ No ____.

35. Do you understand all these questions? Yes ✓ No ____.

If not, which ones do you not understand? NO

36. Is there any other information or advice you want before you enter a plea of GUILTY? Yes ____. No ✓.

37. Do you understand that if you plead GUILTY the Court may place you under oath and ask you questions about the offense or offenses to which you have pleaded and the answers to these questions may later be used against you in a prosecution for perjury or false statement or in any proceedings challenging the entry of your plea? Yes ✓ No ____.

38. Do you now want to plead GUILTY? Yes ✓ No ____.

I, therefore, petition the Court to accept my plea of GUILTY.

This 13 day of AUGUST 19 79

X Ruth Jair
DEFENDANT

Sworn to and subscribed before me this 13 day of AUGUST 19 79

Michael R Casper
Notary Public

CERTIFICATE OF COUNSEL

I, as attorney for the defendant, hereby certify that:

1. I have read and fully explained to the defendant all of the charges contained in the indictment or information in this case.

2. I have explained and discussed with defendant the facts and elements of the case which the prosecution must prove and the defenses that may be available to the charge or charges.

3. I have explained to the defendant the maximum penalty provided by law for the offense or offenses to which the defendant offers a plea of guilty and the possible consequences of a plea of guilty.

4. The plea of guilty offered by the defendant to the charge or charges accords with my understanding of the facts the defendant has related to me, is consistent with my advice to the defendant, and in my opinion is voluntarily and understandably made.

5. To the best of my knowledge and belief the statements, representations and declarations made by the defendant in the foregoing petition are in all respects accurate and true.

6. I do not know of any reason why the Court should not accept the plea of guilty.

This 13 day of AUGUST 19 79

X George W. Bunson
Attorney for Defendant

Michael R Casper

ORDER

After examination by the Court, the Court ascertains, determines and adjudges, that the plea of guilty by the defendant is freely, understandingly and voluntarily made, and was made without undue influence, compulsion or duress, and without promise of leniency. It is, therefore, ordered that his plea of guilty be entered on the minutes, and that this Transcript and Certificate be filed with the (indictment) (Accusation).

This 14th day of Aug. 19 79

A. J. Hangon
JUDGE, SUPERIOR COURTS
NORTHEASTERN JUDICIAL CIRCUIT

RECORDED

FILED IN OFFICE
This 14th day of Aug., 1979
H. Grady Watson 10:40 A.M.
H. GRADY WATSON, Clerk

A P P E X D I X B

(Excerpts from Petitioner's guilty plea transcript).

IN THE SUPERIOR COURT OF HALL COUNTY

STATE OF GEORGIA

THE STATE

vs.

KEITH FAIR

CASE NO. K-45668

OFFENSE: Murder

DATE OF TRIAL - 14-16 August 1979

VOLUME 1 OF 2 VOLUMES
Pages 1 through 250

BEFORE THE HONORABLE A. R. KENYON, Judge presiding.....

FILED
HALL CO., GA.
'79 OCT -2 PM 3:31
H. GRADY WATSON
CLERK SUPERIOR COURT
BY

APPEARANCES:

FOR THE STATE: Mr. Roland Stroberg, Assistant District Attorney, Northeastern Judicial Circuit.

FOR THE DEFENDANT: Mr. George Brinson and Mr. Michael Casper , Attorneys at Law, Gainesville, Georgia.

I N D E X:

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JOHN ATTAWAY.....	48-79	79-85	85-86		
MELODY TETHEROW.....	86-88	88-90	90-91		
RICKY TURNER.....	91-94	94-100	100-103	103-104	
BYRON DAWSON.....	106-138	138-147	147-152 153.	152-153	
KELLY FITE.....	154-159	160-161			
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I N D E X Cont'd:

Witnesses For The State, Cont'd:

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WESLEY WALLRAVEN.....					
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MELVIN PEARSON.....					
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MICHAEL MARABLE.....					
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Witnesses For The Defense:					
ALONZO WADE.....					
	378-381	381.	381-382	382.	382.
BECKY TINCH.....					
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LINDA RIDER.....					
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WAYNE DAVIS.....					
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	404-425	425-442 450-452	452-453	453-454	

I N D E X Cont'd:

Witnesses For The Defense, Cont'd:

	Direct	Cross	Redirect	Recross	ExamBy Court
CLYDE GARRISON.....					
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Hearing on Defense Motions Prior to Trial on 10 August 1979	508-533
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This Hearing came on to be had in the Superior Court of Hall County, Gainesville, Georgia at 9:30 a.m., 14 August 1979 before the Honorable A. R. Kenyon, Judge presiding.

THE COURT: You may call the next case for trial.

MR. STROBERG: Court please, I believe the Court stated that we would hear the Motions on Mr. Fair, the ones we have not heard.

THE COURT: Yes, sir. Yes, sir, all right, sir.

MR. BRINSON: Court please, there will be a guilty plea ~~in~~ this case.

THE COURT: Very well, sir. Bring the -- let the Defendant be brought in.

MR. STROBERG: Let me send for the Indictment.

THE COURT: Are there any Motions that need to be taken up before --

MR. CASPER: None before we dispose of this matter.

THE COURT: All right, sir.

MR. CASPER: There will be a few after.

(Pause).

MR. STROBERG: Court please, I believe before we get started we should inquire whether there are any jurors or prospective jurors in the courtroom?

THE COURT: I inquired earlier, Mr. Stroberg.

MR. STROBERG: Yes, sir, I see.

(Pause).

THE COURT: Are they bringing the Defendant?

MR. STROBERG: Yes, sir, they're arranging that now.

THE COURT: All right. Mr. Brinson, Mr. Casper, have you been over the petition to enter plea form with Mr. Pair?

MR. BRINSON: Yes, sir.

MR. CASPER: Yes, your Honor. Do you want that Petition now?

THE COURT: Yes, sir, if that's been completed. You have the Indictment Mr. Stroberg?

MR. CASPER: He has to initial that, the change.

MR. STROBERG: It's been changed.

THE COURT: I think he should sign it.

The Defendant entered the Courtroom at this time.

MR. CASPER: Your Honor -- ?

THE COURT: Yes, sir.

MR. CASPER: The Defendant states to me at this time that he wishes to speak with Counsel and have some additional questions answered, and we would ask for a short continuance at this time so we could confer with him.

THE COURT: Very well, sir, we'll take a ten minute recess. Court will be in recess for ten minutes.

The Court recessed at 9:40 a.m., 14 August, 1979 and later reconvened at 9:50 a.m., this same date.

MR. CASPER: We're ready to proceed if the Court please.

THE COURT: Very well. Has issue been joined on the Indictment?

MR. CASPER: Yes, sir. We need to initial the change in the Indictment. I believe the Court has that.

MR. STROBERG: I have it right here.

MR. CASPER: All right.

EXAMINATION OF THE DEFENDANT BY THE COURT:

Q. Your name is Keith Fair?

A. Yes, sir.

Q. Mr. Fair, can you hear me all right?

A. Yes, sir.

Q. Are you now under the influence of drugs or alcohol to any extent?

A. No, sir.

Q. Mr. Fair, how much formal school did you complete?

A. Seventh Grade.

Q. You're charged by an Indictment returned by the Grand Jury of this County with the Offense of Murder. The Indictment charges in the name and behalf of the Citizens of Georgia Keith Fair, referred to as the accused, with the offense of Murder, for that the accused on the 9th day of May, 1979 in Hall County did then and there unlawfully, feloniously, willfully of his malice aforethought and with force and arms kill and murder one Jackie

Morris, referred to as the victim, a human being in the peace of God and said state then and there being by shooting said victim with a pistol, which said accused then and there held and giving to the victim a mortal wound of which mortal wound the victim died all contrary to the Laws of this State. Now let me ask, have you had sufficient time to discuss this case with your Attorneys, Mr. Casper and Mr. Brinson?

A. Yes, sir.

Q. Is there anything you want to discuss with them further before we proceed with determination as to whether we can accept your plea?

A. No, sir.

Q. You've been over with them I'm advised a Petition to Enter a Plea of Guilty on which there appears some thirty-eight questions checked yes or no. I'll ask the Bailiff to Exhibit this to you and ask you to examine this Petition to Enter Plea of Guilty in this case and see if that is the form you went over with your Attorney, and if that is your signature on the backside?

A. Yes, sir.

Q. Did you go over that carefully with your Attorney?

A. Yes, sir.

Q. Did you answer those questions correctly yes or no?

A. Yes, sir.

Q. Is that your signature?

A. Yes, sir.

Q. Was this questionaire answered freely and voluntarily?

A. Yes, sir.

Q. Now the Court is required to go over things that your Attorneys have already been over with you so that I can satisfy myself directly from talking with you that you understand your rights in this matter and the affect of this proceeding, and that you are acting freely and voluntarily and not under threat or coercion of any kind. Your age is twenty-eight?

A. Yes, sir.

Q. Are you able to read and write?

A. Yes, sir.

Q. To your knowledge do you suffer from any mental or emotional disability?

A. No, sir.

Q. Have you received through your Attorneys a copy of the Indictment in this case?

A. Yes, sir.

Q. Have you read it or had it read to you and explained to you?

A. Yes, sir.

Q. Do you fully understand the charge against you in this case?

A. Yes, sir.

Q. Have you had sufficient time now to talk with your Attorneys concerning the charge and concerning your rights in this

trial?

A. Yes, sir.

Q. Have you discussed your case fully and explained everything you know about it to your Lawyer including all the facts and circumstances surrounding any statement, confession or other evidence obtained from you by anyone?

A. Yes, sir.

Q. Have your Lawyers advised you of the nature of the charges against you and any possible defenses you may have including the right to challenge the legality of any statement, confession or other evidence obtained or seized from you?

A. Yes, sir.

Q. Do you understand that you have a right to plead not guilty to the charge and to remain silent?

A. Yes, sir.

Q. Do you understand that if you plead not guilty you have a right to a speedy and public trial by a Judge and a Jury?

A. Yes, sir.

Q. Do you understand that if you plead not guilty you have the right to confront, that is, to see, hear, question and have cross-examined; questioned by your Lawyers the witnesses called by the State to testify against you?

A. Yes, sir.

Q. You understand that if you plead not guilty you have a right to use the subpoena power of this Court to require the

attendance of witnesses on your behalf whether they want to come to Court or not?

A. Yes, sir.

Q. Do you understand that if you plead not guilty you have the right to testify or not testify as you chose on the trial, that you cannot be required to testify, and that if you do not testify the Jury cannot take that as evidence against you?

A. Yes, sir.

Q. Do you understand that if you plead not guilty you will be presumed to be innocent, and that before you can be convicted the prosecution will have the duty of proving your guilt beyond a reasonable doubt?

A. Yes, sir.

Q. Do you understand that in the event you were convicted in a trial you would have the right to appeal your conviction?

A. Yes, sir.

Q. Do you understand that if you plead guilty you will have waived, that is, given up each of the rights mentioned in the questions that the Court has just asked you?

A. Yes, sir.

Q. Do you realize that if you plead guilty that this Court acting through me may impose the same punishment as if you pleaded not guilty and had been convicted?

A. Yes, sir.

Q. Do you know the sentence that you can receive as a

result of your verdict -- as a result of your plea of guilty in this case?

A. Yes, sir.

Q. Have you been advised by your Attorneys, and discussed with them, the fact that even though you enter a plea of guilty that the Court still has the authority to impose the death penalty in this case?

A. Yes, sir.

Q. Do you realize that if you plead guilty the Court may sentence you to the maximum punishment authorized by Law on the offense that you're charged with?

A. Yes, sir.

Q. Now has any person made any threat against you to influence you to enter your plea in this case?

A. No, sir.

Q. Has any person made any promise to you or convinced you that they were making a promise or that if you entered a plea they were guaranteeing that you would get some special treatment because of that plea?

A. No, sir.

Q. Has any person, your Attorneys or otherwise suggested to you, or represented to you that because of a plea of guilty that would result in your not getting the death penalty?

A. No, sir.

Q. Has there been any plea agreement made with you throu

your Attorneys, or between you and your Attorneys, or the District Attorney as to a sentence that might be imposed as a result of your plea of guilty?

A. No, sir.

Q. What do you understand, Mr. Fair, a plea of guilty to mean?

A. Pleading guilty, I done it and I want to plead guilty.

Q. Are you entering this plea freely and voluntarily?

A. Yes, sir.

Q. Did you commit the act set forth in the Indictment as read to you by the Court?

A. Yes, sir.

Q. Did you shoot Jackie Morris?

A. Yes, sir.

Q. Has -- have your Attorneys gone over all of questions that I've just asked you with you previously?

A. Yes, sir.

Q. Are you satisfied with the representation that you have had by your Attorneys Mr. Brinson, Mr. Casper?

A. Yes, sir.

Q. Is there any question you want to ask them, either privately, or now, or any question you want to ask me before we proceed further?

A. No, sir.

Q. Do you understand that if the Court accepts your

plea of guilty the Court may place you under oath and ask you questions about the offense, or offenses, to which you have pleaded and that the answers to these questions may later be used against you in a prosecution for perjury or false statement, or any proceedingchallenging the entry of your plea?

A. Yes, sir.

Q. Do you understand that any statements taken by the Investigating Officers in this case, unless they're taken in accordance with the requirements of Law and taken freely and voluntarily cannot be used against you?

A. Yes, sir.

Q. Do you now plead guilty to the charge as read to you by the Court?

A. Yes, sir.

Q. Have you discussed with your Attorneys what is necessary for the Court to prove the charge of murder?

A. Yes, sir.

Q. You understand the elements that the State has to prove to convict a person of murder?

A. Yes, sir.

Q. Is there any question you want to ask -- ask about this before we proceed further?

A. No, sir.

Q. You understand fully that you have a right to have both the question of guilt or innocence as well as the question of

punishment tried before a jury if you want it?

A. Yes, sir.

THE COURT: Are there any additional questions that Counsel, either for the State or the Defendant, would request the Court to ask?

MR. STROBERG: Court please, I believe on Friday or Thursday the Court discussed this matter with Mr. Brinson and myself and I am certain that this has been related to Mr. Fair, but of course the Court pursuant to both this case and the cases concerning the other co-defendants has made incamera inspections of the file here, if the Court Please, and wanted -- and of course the Court stated the Court would only consider the evidence that was admitted in the punishment phase but I think that we should make certain that Mr. Fair is aware of that.

EXAMINATION OF THE DEFENDANT BY THE COURT, Cont'd:

Q. Are you aware of the fact that the -- your Attorneys filed what's called a Motion to Require the State to Produce all evidence for them to inspect on your behalf that might be favorable to you?

A. Yes, sir.

Q. And are you aware that after the State did that your Attorneys also asked me as the presiding Judge in this case to go through the State's file to determine whether there was any other favorable evidence?

A. Yes, sir.

Q. Did your Attorneys provide for your inspection copies of numerous witnesses in this case?

A. Yes, sir.

Q. And copies of the autopsy report?

A. Yes, sir.

Q. Do you know of any witnesses that you have not seen statements of in connection with this case?

A. No, sir.

Q. Now I assume from the consideration of your Counsel that they have discussed with you their views as to what my views are as to capital punishment. Have they told you that I have stated in Court that I am not conscientiously opposed to capital punishment?

A. Yes, sir.

Q. Do you understand that so far as my conscientious scruples are concerned that if the evidence indicated it under the law that I would not because of conscience decline to impose the death penalty?

A. Yes, sir.

Q. And you still want to go ahead with your plea in this case?

A. Yes, sir.

Q. All right, would you just in a few words state what you did as to Jackie Morris. I don't need at this stage the whole background, we will go into that on the sentencing phase, but I

want you to state just what you did at the time of the shooting?

A. I shot Jackie Morris.

Q. What did you shoot him with?

A. A twenty-two pistol.

Q. And how many times did you shoot him?

A. Three.

Q. Where was he when you shot him?

A. He was standing beside the car.

Q. And where was that?

A. It was over on this dirt road.

Q. Was that in Hall County?

A. We had went down there to burn his car.

Q. And why did you do it?

A. I don't know, it just happened all of a sudden. We was pretty drunk and we had a little argument, and I don't know what happened.

Q. Where on his body or head did you shoot him?

A. I just -- I just shot him, I wasn't sure exactly where it was.

Q. And then how many times did you shoot him?

A. Three.

Q. And what did you do after you had shot him?

A. Went home.

Q. What did you do with Jackie Morris after you'd shot him?

A. Left him there.

Q. Left him where?

A. In his car.

Q. Was he in his car when you shot him?

A. No, sir.

Q. Who moved him into his car?

A. He and Dexter Thomas.

Q. When did you first talk with Mr. Brinson or Mr. Casper, do you recall about how long ago it was?

A. It was right after they was appointed to me.

THE COURT: Mr. Brinson or Mr. Casper can you assist the Court with the approximate date?

MR. BRINSON: Well, if the Court please, I was appointe on July the 13th, I believe it was July the 13th, and I spoke with him on that day, and then within a week thereafter.

THE COURT: And would you relate to the Court about how many times you and Mr. Casper and Mr. Fair had talked?

MR. BRINSON: We've made numerous trips both to the Forsyth County Jail and to the DeKalb County Jail, I would say at least five, at least five trips, and on each occasion the conferences generally lasted in excess of two and a half hours. There has been considerable discussion among all parties concerned. I would state for the record that the only time I've talked with the Defendant outside of the presence of Mr. Casper was the first time I spoke with him after I was appointed to represent him, that is

to say the first time I went to Forsyth County Jail I spoke with him as sole counsel. It was only after that time that Mr. Casper was appointed as co-counsel, and from that point forward each time we met with the Defendant we met together.

THE COURT: Have you been able to talk with him privately?

MR. BRINSON: Yes, sir. I would state that the authorities have been cooperative in that respect, we've had opportunities to meet in private without the presence of an Officer

THE COURT: Mr. Fair, do you agree with all that Mr. Brinson has just said?

DEFENDANT FAIR: Yes, sir.

THE COURT: Mr. Casper, do you have anything to add to this as to the conferences with Mr. Fair?

MR. CASPER: Your Honor, I would only add and state for the record that considerable time has been spent with Keith Fair in explaining to him the entire situation, from the details of what happened out there that night, the investigation of all the witnesses concerned, and there were some forty-two, consideration of any possible defenses that he might have to the charge, consideration of the framework of the trial, the bifercated, or two part process of the trial, first part to determine guilt or innocence, and the second part to determine punishment. I feel like, and I state for the record that I feel confident that Mr. Fair has, and I think I speak for Mr. Brinson, has spent considerab

time and ample time and I feel confident that Mr. Fair's plea that he is offering to the Court is being offered voluntarily and with full knowledge that each of the rights guaranteed to him under his right to a Jury Trial has been considered, considered many times, that he has been advised of the right of his opportunity to call witnesses on his behalf, to have us cross-examine witnesses that the State produced against him, the ability that he had to make a statement or not to have a statement made, and that if he did not make a statement then that fact could not be used against him. Of particular importance was the ability of Keith Fair to appeal a verdict of the Jury if he should wish to appeal, and explaining to him by entering this plea of guilty he's giving up all the rights or all the privileges granted to him by trial by Jury. There are many matters of course that we would offer to the Court, I don't think they're appropriate at this particular time, there are some additional matters concerning particular time spent, the number of hours, this type of thing that I would and Mr. Brinson would like to get on the record but again that's not the appropriate time at this point, but I will state for the record that I feel that every avenue has been discussed, every possibility discussed and that the decision has been keith Fair's.

THE COURT: Mr. Fair, would you disagree with or add to anything that Mr. Casper has just stated?

DEFENDANT FAIR: No, sir.

THE COURT: All right, let me state to you in simple

terms that I'm not unaware of course of the seriousness of this moment in your life. You are having to make a decision as to whether you will place your life in the hands of twelve people or whether you'll place it in the hands of one man. I want to be sure that you know what you're doing and that if you do this you're doing it freely and voluntarily and that you fully understand all of the rights involved. I'm going to take a brief recess, Counsel can advise the Court, we'll be in recess at least ten minutes, if you need more time you can have more time, but I want you to have an opportunity alone with your two Attorneys once again to consider whether you want to enter a plea of guilty. We'll be in recess now for ten minutes for that purpose.

The Court recessed at 10:20 a.m., 14 August 1979 and later reconvened at 10:32 a.m., this same date.

THE COURT: Counsel for the Defendant desire some additional time so we'll be in recess until they're ready.

The Court recessed at 10:33 a.m., 14 August 1979 and later reconvened at 10:45 a.m., this same date.

THE COURT: Have you discussed the matter with Mr. Fair?

MR. CASPER: Yes, your Honor, we have. We're ready to proceed.

THE COURT: Very well. The Court will accept the plea. You may be seated Mr. Fair.

MR. STROBERG: If the Court please, I assume that for

the purposes of the record I believe Mr. Fair should be asked after he came back --

THE COURT: Yes, sir.

MR. STROBERG: -- whether or not he desires to --

THE COURT: Mr. Fair, you may remain seated. You've now had additional time with your Attorneys, do you still want to go forward with your plea of guilty?

DEFENDANT FAIR: Yes, sir.

THE COURT: Very well, sir.

MR. STROBERG: I assume, if the Court please, the Court will mark filed with the Clerk at present the Petition to Enter the Plea of Guilty as well as the plea of guilty which has been entered on the back of the Indictment?

THE COURT: Yes, sir, I will do that. Now I'll hear from Counsel as to -- is there any contention on the part of the State that the question, the issue of punishment should be submitte to a Jury in this case?

MR. STROBERG: No, sir.

THE COURT: Is there any contention on the part of Defense Counsel that a Jury should be empaneled now to determine the question of punishment?

MR. BRINSON: No, sir.

THE COURT: The Court is now filing with the Clerk the written Petition to Enter Plea of Guilty in the State versus Keith Fair, 45668, signed by Mr. Fair and by his Attorneys and by

the Court, and also will file with the Clerk at this time the Indictment containing the Plea of Guilty by Mr. Fair. Are Counsel ready to proceed with the second phase of this matter, that is, the trial of the issue of punishment?

MR. CASPER: Your Honor, we would be ready to proceed if a few preliminary matters In Limine were taken up.

THE COURT: All right, sir, we'll take those -- is the State ready to proceed?

MR. STROBERG: Court please, this throws us approximately around a half a day off schedule, we of course can proceed. I do need -- I would need around thirty minutes to make some phone calls, ask the Court how long the Court plans to hold today, I have the Crime Lab People whom I want to use who are -- have been prepared to come at any time, and we anticipated the Jury coming in at eleven o'clock and getting them here later on this afternoon or maybe tomorrow morning. We -- if we could have about thirty minutes and an estimate on the Court of how far or how long the Court expects to run today then I can get lined up and be ready to go.

THE COURT: All right. Let's take up any preliminary Motions or matters that have to be disposed of before we proceed, and at the conclusion of that I will make some statement as to a schedule Counsel can anticipate.

MR. CASPER: Your Honor, I'll simply work through the Motions and address those Motions that I think are applicable in

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